THE DISTRICT OF COLUMBIA
ALCOHOLIC BEVERAGE CONTROL BOARD

In the Matter of	
Safeway, Inc. t/a Safeway New Application for a Retailer's License Class "B" - at premises 1855 Wisconsin Avenue, N.W. Washington, D.C.	Case No.: 50232-03/028P Order No.: 2004-62
Applicant	

BEFORE: Charles A. Burger, Chairperson
Vera M. Abbott, Member
Audrey E. Thompson, Member
Judy A. Moy, Member
Peter B. Feather, Member[1]

ALSO PRESENT: Jerry A. Moore, III, Esquire, on behalf of the Applicant

Douglas E. Fierberg, Esquire, on behalf of the Protestants

Frederick P. Moosally, III, Esquire, General Counsel
Alcoholic Beverage Regulation Administration

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER

The application, filed by Safeway, Inc., t/a Safeway ("Applicant"), for a new Retailer's License Class "B" at premises 1855 Wisconsin Avenue, N.W., Washington, D.C., initially came before the Alcoholic Beverage Control Board ("Board") for a roll call hearing on June 4, 2003. It was determined that timely protests were filed pursuant to D.C. Official Code § 25-601 (2001), by Tom Birch, Chair, on behalf of Advisory Neighborhood Commission ("ANC") 2E; Raymond Kukulski, President, on behalf of the Citizens Association of Georgetown ("CAG"); and Denis James, Kenneth A. Golding, LaCrisha Butler, Judith Katz, Daniel Wedderburn, Marshall Bykofsky, and Stephen Davenport, each of whom serve on the Board of Directors of the Jelleff Boys and Girls Club located at 3265 S Street, N.W.

[1] ABC Board member Peter B. Feather was not a member when these proceedings were initiated and did not participate or vote on this matter.

Subsequent to the June 4, 2003 roll call hearing, the Board held a motions hearing on July 9, 2003 to hear oral arguments from the parties to determine whether the Board is prohibited by D.C. Official Code § 25-314(b)(1) (2001), from issuing a new Class "B" Retailer's License to the Applicant. Specifically, D.C. Official Code § 25-314(b)(1) (2001), prohibits the issuance of an alcoholic beverage license to any establishment within four hundred (400) feet of a public, private, or parochial primary, elementary, or high school; college or university; or recreation area operated by the District of Columbia Department of Recreation. In this case, the Board must determine whether the Applicant's establishment is located within four hundred (400) feet of Hardy Middle School, located at 1819 35th Street, N.W. If the Applicant's establishment is located within four hundred (400) feet of Hardy Middle School, the Board must also determine whether the establishment meets one of the exceptions set forth in D.C. Official Code §§ 25-314(b)(2) and 25-314(b)(3) (2001).

The Board having considered the evidence, the testimony of the witnesses, the arguments of counsel, the post-hearing submissions of the parties, and the documents comprising the Board's official file, makes the following:

FINDINGS OF FACT

1. On March 24, 2003, Glenn E. Davis, Vice President, Finance, Safeway, Inc., filed an application for a new Retailer's License Class "B" on behalf of Safeway, Inc., t/a Safeway, at premises 1855 Wisconsin Avenue, N.W., Washington, D.C. 20007. (Alcoholic Beverage Regulation Administration ("ABRA") Application File #50232.) The Applicant's establishment is a full service grocery store that retails a full range of grocery items including food, prescription drugs, general household items, flowers, delicatessen products, a bakery, banking, and catering. (ABRA Application File #50232.)

2. Hardy Middle School is located at 1819 35th Street, N.W., diagonally across Wisconsin Avenue, N.W., to the West of the establishment. (Tr. 7/9/03 at 9, 19, 56.) Jerry Moore, Esquire, on behalf of the Applicant, represented to the Board that the establishment was formerly located on Lot 1020 in Square 1299, and that the establishment's parking lot was located in front of the Safeway store building on Lot 1021. (Tr. 7/9/03 at 8.) Mr. Moore represented that both lots were located in the C-2-A zone district, "a zone that permits and promotes full-service grocery uses as a matter of right." (Tr. 7/9/03 at 9.) Mr. Moore represented that the establishment has subdivided its lot to create two new lots that have been assigned tax lot numbers 1030 and 1031 by the District of Columbia Office of the Surveyor. (Tr. 7/9/03 at 9; Applicant's Exhibit No. 1.)

3. Mr. Moore argued that the linear distance between the property line of the Hardy Middle School and the property line of the establishment where beer and wine would be sold and stored -- tax lot 1030 -- is not within the prohibited distance of four hundred (400) feet. (Tr. 7/9/03 at 34; Applicant's Exhibit No. 1.) Mr. Moore argued that the Board's decision in Bread & Circus, Inc., t/a Bread & Circus, 2323 Wisconsin Avenue,

N.W., Class "B", Board Case No. 33663-95047P, dated December 5, 1995 ("Bread & Circus decision"), regarding the "400 foot issue," was resolved by subdividing the former assessment and taxation lot into two new assessment and taxation lots.[2] (Tr. 7/9/03 at 35; Applicant's Exhibit No. 2.)

4. Daniel M. Duke is a professional engineer employed since 1997 as a Project Manager for Bowler Engineering, located at 22630 Davis Drive, Sterling, VA 20164. (Tr. 7/9/03 at 11-12.) He has two degrees from Villanova University -- a Bachelors of Science degree in Civil Engineering that he earned in 1995, and a Masters degree in Civil Engineering. (Tr. 7/9/03 at 11.) Mr. Duke is a registered professional engineer in the District of Columbia, Maryland, and Virginia. (Tr. 7/9/03 at 11-12.) He was hired by the Applicant to research the distance between the Hardy Middle School located at 1819 35th Street, N.W., and the property line of the establishment. (Tr. 7/9/03 at 12, 56.) In reviewing the tax lot and maps of the District of Columbia, Mr. Duke determined that the Applicant's building located at 1855 Wisconsin Avenue, N.W., is more than four hundred (400) feet from the Hardy Middle School, and that the area of the Applicant's building from which beer and wine would be sold -- tax lot 1030 -- is also more than four hundred (400) feet from the property lines. (Tr. 7/9/03 at 12, 14; Applicant's Exhibit No. 1.)

5. At Safeway's request, Mr. Duke was involved in obtaining a subdivision of the establishment's plat into tax lots 1030 and 1031. (Tr. 7/9/03 at 13-14.) Mr. Duke acknowledged that the establishment still owns tax lots 1030 and 1031. (Tr. 7/9/03 at 13-14.) Mr. Duke stated that this change was simply a tax change and that none of the rights of ownership or control for the property changed as Safeway still owns both tax lot 1030 and tax lot 1031. (Tr. 7/9/03 at 15-16.) Mr. Duke noted that before the tax change, the establishment's entire parking lot was in dedicated use for the establishment. (Tr. 7/9/03 at 16.) Mr. Duke acknowledged that the establishment's parking lot is still under the same common ownership of Safeway, but on a separate tax lot, and is associated with its use. (Tr. 7/9/03 at 17-18.) Safeway's parking lot indicates that parking is only for two hours while shopping at Safeway. (Tr. 7/9/03 at 17.) Mr. Duke indicated that the Hardy parking lot is part of the Hardy Middle School and also associated with its use. (Tr. 7/9/03 at 18.)

6. Mr. Duke noted that tax lot 1030 and tax lot 1031 are contiguous and that with tax lot 1031 there is frontage on Wisconsin Avenue, N.W., for tax lot 1030. (Tr. 7/9/03 at 14.) Otherwise, tax lot 1030, where Safeway's building is primarily located would have no frontage on Wisconsin Avenue, N.W. (Tr. 7/9/03 at 15, 30-31.) Mr. Duke acknowledged that front doors to the establishment are actually located on tax lot 1031, which extends approximately thirty (30) feet into the store and that the line for tax lot 1030 is located approximately thirty (30) feet inside of the store from the front doors. (Tr. 7/9/03 at 30-31.)

[2] Although the Board's December 5, 1995 Bread & Circus decision is not listed on the index of the July 9, 2003 fact-finding transcript as an exhibit; it was marked at the July 9, 2003 hearing and accepted by the Board as Applicant's Exhibit No. 2. (Tr. 7/9/03 at 37.)

7. With regard to determining the property lines, Mr. Duke used the land records of the District of Columbia to define the property lines. (Tr. 7/9/03 at 19.) Mr. Duke clarified that the property line for Hardy Middle School is defined as the "right-of-way line" on the other side of Wisconsin Avenue, N.W., from the establishment's property. (Tr. 7/9/03 at 19.) Mr. Duke explained that a right-of-way line is the property line that defines a public property area such as for a roadway, and explained that Wisconsin Avenue, N.W., has two right-of-way lines, one on each side of Wisconsin Avenue, N.W. (Tr. 7/6/03 at 20.) Mr. Duke used the actual right-of-way line, which is the property line that separates Wisconsin Avenue, N.W., from the Hardy Middle School. (Tr. 7/9/03 at 20.) The right-of-way line for Hardy Middle School is on the opposite side of Wisconsin Avenue, N.W. (Tr. 7/9/03 at 23.) Mr. Duke noted that a right-of-way line and a property line are one and the same. (Tr. 7/9/03 at 28-29.) He stated that a right-of-way line simply denotes that it is part of the public domain, the public right-of-way. (Tr. 7/9/03 at 29.) Mr. Duke knows where the property line is based upon the tax maps and noted that he used the property line as the point of measurement. (Tr. 7/9/03 at 21.) Mr. Duke determined that from the Applicant's building, the nearest property line of Hardy Middle School is four hundred and twenty (420) feet. (Tr. 7/9/03 at 24-25, 33.) Mr. Duke determined that the distance between the Applicant's building and the nearest corner of the Hardy Middle School building is four hundred and thirty four (434) feet. (Tr. 7/9/03 at 24-26, 32.) Mr. Duke measured from one of the alcoves that the establishment recently added to the building that contains the front doors to enter the building on the northern side of the building. (Tr. 7/9/03 at 26.)

8. Mr. Duke did not take a measurement between the total taxable square lot that Safeway controls and the area that Hardy Middle School controls. (Tr. 7/9/03 at 25.) Mr. Duke did not measure from the Safeway parking lot corner of tax lot 1031 to the Hardy Middle School. (Tr. 7/9/03 at 27.) Mr. Duke acknowledged that this measurement would be less than four hundred (400) feet. (Tr. 7/9/03 at 27.) Mr. Duke did not measure from the Safeway building to the edge of the Hardy Middle School parking lot. (Tr. 7/9/03 at 27.)

9. Douglas Fierberg, Esquire, on behalf of the Protestants, argued that the property line of the establishment is at the beginning of its customer parking entrance that is on Wisconsin Avenue, N.W., on tax lot 1031. (Tr. 7/9/03 at 43.) He argued that tax lots 1030 and 1031 are the same store, same use, same ownership, same control, and same operation, and that the establishment's change in the plats was solely for purposes of tax reporting. (Tr. 7/9/03 at 44.) Mr. Fierberg argued that the only difference is that the Applicant will receive two tax bills. (Tr. 7/9/03 at 44, 47.) He argued that it does not matter in terms of what is the functional property line of the licensed establishment. (Tr. 7/9/03 at 45.) Mr. Fierberg argued that if the establishment's property line is not measured from tax lot 1031, the Applicant's building has no address to measure. (Tr. 7/9/03 at 44-45.) He argued that the distinction that the establishment has made is a tax use difference, not a land use change in terms of zoning, so that the front lot on which the establishment sits, is still wholly subservient and dedicated to the use of the establishment. (Tr. 7/9/03 at 47.)

10. Mr. Fierberg argued that in the matter of Tiger Wyk Limited, Inc., t/a Tiger Market ("Tiger Market") (Board Case No. 35181-98013P), wherein the licensee sought to transfer its Class "B" Retailer's License to a new location, which was surrounded by a very large parking lot and located near another Class "B" establishment, the Board decided that the distance should be measured from the corner of Tiger Market's building, instead of measuring the distance from the property line of the parking lot used by patrons of Tiger Market. (Tr. 7/9/03 at 41.) Mr. Fierberg argued that the Board based its decision upon the fact that Tiger Market did not own the parking lot, the parking lot was not solely dedicated to the use of Tiger Market, and that the parking lot serviced all of the other businesses in that shopping center. (Tr. 7/9/03 at 41-42.) Mr. Fierberg argued that in this case the property line of the establishment's operation begins at the front side entrance where Safeway's parking lot is located on Wisconsin Avenue, N.W., in tax lot 1031, and that the parking lot is fully dedicated to the establishment's use. (Tr. 7/9/03 at 42-43.)

11. ABRA Investigator Willie Blount visited the establishment and personally took measurements of the property. (Tr. 7/9/03 at 55-56.) Investigator Blount determined that the measurement from the property line of the establishment -- tax lot 1031 where the establishment's parking lot is located -- to the property line of Hardy Middle School is one hundred and twenty-three (123) feet, and that the measurement from the property line of the establishment to the Applicant's building is an additional three hundred and six (306) feet. (Tr. 7/9/03 at 56-58, 60; Applicant's Exhibit No. 1.) Investigator Blount determined that the measurement from the building of Safeway to the building of Hardy Middle School is four hundred and twenty nine (429) feet. (Tr. 7/9/03 at 56-59.) Investigator Blount stated that his measurements were taken from the nearest points he could find. (Tr. 7/9/03 at 58.) Investigator Blount stated that he has measured from property line to property line on numerous occasions and that his measurements were taken with a roller tape, which is also used by the Metropolitan Police Department and the Department of Transportation. (Tr. 7/9/03 at 59-60, 66.) Mr. Blount was not aware of any other Class "B" licensed establishments located within four hundred (400) feet of the establishment. (Tr. 7/9/03 at 61.)

12. Investigator Blount did not take a measurement between the establishment and the Jelleff Washington Boys and Girls Club located at 3265 S Street, N.W., because the property lines abut. (Tr. 7/9/03 at 57.)

CONCLUSIONS OF LAW

13. The Applicant requests this Board to grant its application for a new Retailer's License Class "B" at premises 1855 Wisconsin Avenue, N.W., Washington, D.C. Whether a new Class "B" Retailer's License can legally be granted to the Applicant at this location depends upon our analysis of D.C. Official Code § 25-314 (2001) to the facts of this particular case. Specifically, the Board in considering the Applicant's request must determine whether: (1) the establishment is located within four hundred (400) feet of a public, private, or parochial primary, elementary, or high school; college or university; or recreation area operated by the D.C. Department of Recreation, as

prohibited by D.C. Official Code § 25-314(b)(1); and (2) the establishment meets one of the exceptions set forth in D.C. Official Code §§ 25-314(b)(2) and 25-314(b)(3) (2001).

14. Pursuant to D.C. Official Code § 25-314(b)(1) (2001), the Board finds, for the reasons set forth below, that the establishment's property line is located within four hundred (400) feet of the Hardy Middle School. Additionally, the Board finds that the establishment fails to meet one of the exceptions set forth in D.C. Official Code §§ 25-314(b)(2) and 25-314(b)(3) (2001) and is thus prohibited from being issued a new Class "B" Retailer's License.

A. The 400 Foot Rule

15. D.C. Official Code § 25-314(b)(1) (2001) prohibits the Board from issuing an alcoholic beverage license for any establishment located within four hundred (400) feet of a public, private, or parochial primary, elementary, or high school; college or university; or recreation area operated by the D.C. Department of Recreation.[3] In this case, the Board must determine whether the Applicant's establishment is within four hundred (400) feet of Hardy Middle School. The Board notes that the term "middle school" is not specifically used in D.C. Official Code § 25-314(b)(1)(2001). However, a comparison of elementary school education grades, as set forth in 5 DCMR § 1606 (2002), which consist of grades 1 through 6, and "middle school" education grades as set forth in 5 DCMR § 1610 (2002), which consist of grades 4 through 8, revealed that these schools both cover grades 4 through 6. The Board found it reasonable to interpret D.C. Official Code § 25-314(b)(1) to be intended to protect students in grades 4 though 6 at both schools. Additionally, the Board notes that there was no objection raised by either of the parties to the four hundred (400) foot rule applying to Hardy Middle School.

16. In determining whether the Applicant's establishment is prohibited from being issued a new Class "B" Retailer's License because of the four hundred (400) foot restriction contained in D.C. Official Code § 25-314(b)(1), the Board is required to measure the distance pursuant to D.C. Official Code § 25-312(c) (2001). Specifically, D.C. Official Code § 25-312(c) (2001), states in relevant part:

> If the Board is required to state the distance between one or more places, (such as the actual distance or one licensed establishment from another or the actual distance of a licensed establishment from a school), the distance shall be measured linearly and shall be the shortest distance between the property lines of the places. (Emphasis added.).

17. A property line has been recognized in the District of Columbia as the edge of a lot as shown on the records of the District of Columbia. (See Radinsky v. Ellis, 167 F.2d 745 (1948); See also Battle v. George Washington University, 871 F. Supp 1459 (1994);

[3] The Board notes that this statutory provision is a similar version of former alcoholic beverage regulation 23 DCMR § 302.1 (1997).

See D.C. Official Code § 8-205 (2001); See also D.C. Official Code § 25-101(36) (2001), comparing the definition for "parking" in our governing statute, which contains a similar "parking" definition and "property line" reference as D.C. Official Code § 8-205.) In this case, the Board was required to determine whether the property line of the establishment is tax lot 1030 or tax lot 1031. In finding the property line of the establishment to be tax lot 1031, the Board accepted the testimony of ABRA Investigator Blount which revealed that the linear measurement of the property line from the establishment -- from tax lot 1031 where the establishment's parking lot is located -- to the property line of Hardy Middle School is one hundred and twenty-three (123) feet. The testimony of Mr. Duke also verified that the distance from Hardy Middle School to the establishment's parking lot corner on tax lot 1031 would be less than four hundred (400) feet.

18. The Applicant argues that ABRA Investigator Blount's measurement fails to take into account that Safeway has subdivided its lot to create two new lots that have been assigned tax lot numbers 1030 and 1031 by the District of Columbia Office of the Surveyor. As a result of this subdivision, the Applicant states that the measurement from Hardy Middle School should be to the property line of tax lot 1030 -- where the alcoholic beverages are being sold and stored -- and not to tax lot 1031 -- where the establishment's parking lot is located -- as conducted by ABRA Investigator Blount. Additionally, the Applicant argues that the Board should apply to this case its December 5, 1995 written decision in Bread & Circus, Inc., t/a Bread & Circus (Case No. 33663-95047P).

19. The Board notes that it is required to provide a reasoned basis for deviating from any past construction of its regulations or governing statute. See Brentwood Liquors v. D.C. Alcoholic Beverage Control Board, 661 A.2d 652 (D.C. 1995). In its December 5, 1995 Bread & Circus decision, the Board in issuing a new Class "B" Retailer's License to Bread & Circus, Inc., t/a Bread & Circus, at 2323 Wisconsin Avenue, N.W., determined that the four hundred (400) foot rule was not violated. Specifically, the Board accepted documentation from the Applicant showing the subdivision of the Applicant's property into two new tax lots so that all operations concerning the sale and storage of alcoholic beverages were on lot B(2), no portion of which was within four hundred (400) feet of any other Class "B" Retailer's License or a recreation center operated by the D.C. Department of Recreation. As a result, the Board determined that the four hundred (400) foot rule was not violated even though the other subdivided lot was within four hundred (400) feet of both a recreation center operated by the D.C. Department of Recreation and another Class "B" Retailer's License. In this case, the testimony of Mr. Duke and Mr. Blount revealed that the distance between the property line of Hardy Middle School to either the establishment's building or to the property line of tax lot 1030 -- where the establishment intends to sell and store alcoholic beverages -- is also over four hundred (400) feet. Thus, this Board must provide its reasoned basis for deliberately changing its interpretation of the four hundred (400) foot rule as set forth in the Board's Bread and Circus decision, dated December 5, 1995, in deciding in this case to find tax lot 1031 rather than tax lot 1030 as the property line of the establishment.

20. The Board finds in measuring the property line of Hardy Middle School to the property line of the establishment that tax lot 1031 rather than tax lot 1030 is the

appropriate property line of the Applicant's establishment for several reasons. First, the testimony of Mr. Duke revealed that the subdivision by Safeway was simply a tax change and that Safeway still has the same rights of ownership and control over both tax lot 1030 and tax lot 1031, which includes the establishment's parking lot. Second, Mr. Duke's testimony established that tax lot 1031 extends approximately thirty (30) feet into the building of the establishment and includes a front door entrance to the establishment. The Board also finds this to be supporting evidence that tax lot 1030 and tax lot 1031 are part of the same establishment. Third, the Board finds that interpreting the property line of the establishment to be the tax lot where alcoholic beverages are being sold and stored -- the rationale in the Bread and Circus decision -- is inconsistent with D.C. Official Code § 25-312(c) (2001). Specifically, such an interpretation adds language not contained in D.C. Official Code § 25-312(c)(2001) and would also lead to the absurd result of approximately thirty (30) feet of the building of the establishment not being included as part of the "licensed establishment" or "place", as set forth in D.C. Official Code § 25-312(c)(2001) for property line purposes.

21. The Board also notes that an establishment's parking lot and front entrance -- and not just the area where alcoholic beverages are sold or stored -- are areas of concern under D.C. Official Code §§ 25-313 and 25-314 (2001) when in close proximity to children. Specifically, under the District of Columbia's alcoholic beverage laws, including D.C. Official Code § 25-313(b)(2), problems with peace, order, and quiet such as loitering, rowdiness, urination, criminal activity, including drinking in public and adults purchasing alcoholic beverages for minors often occur at the front entrance of and in the adjoining parking lots of alcoholic beverage establishments. This is part of the Board's rationale in finding that the property line of a place or licensed establishment under D.C. Official Code § 25-312 is not just the tax lot where alcoholic beverages are sold or stored.

22. In deciding not to follow the Bread and Circus decision, the Board notes that its current interpretation -- as set forth above -- for measuring the four hundred (400) foot distance was -- as pointed out by the Protestants -- also relied upon by the Board in finding that the Class "B" Retailer's License transfer to a new location application of Tiger Market was not prohibited by the four hundred (400) foot rule. Specifically, in Tiger Market, the Board did not consider the parking lot to be the appropriate property line for measurement purposes because the Applicant did not have exclusive use, control, or ownership over the parking lot area; as such, the Board noted that it would have ruled differently had this been the case.[4] (See Fact-Finding hearing transcript of Tiger Market dated June 23, 1999, pp. 21-23, 34-35.)

[4] The Board recognizes that the four hundred (400) foot issue was not before the D.C. Court of Appeals in Tiger Wyk Limited, Inc., v. D.C. Alcoholic Beverage Control Board, 825 A.2d 303 (D.C. 2003). The Board's ruling, however, that the four hundred (400) foot prohibition was not applicable to the Applicant's transfer to a new location application was necessary prior to the Board's subsequent finding that the license application should be denied, based in part, upon on an overconcentration of licensed establishments located within six hundred (600) feet of the Applicant.

B. Exceptions to the 400 Foot Rule

23. D.C. Official Code §§ 25-314(b)(2) and 25-314(b)(3) (2001) provide exceptions to the four hundred (400) foot restriction. Specifically, D.C. Official Code § 25-314(b)(2) exempts hotel, club, and temporary licenses from the four hundred (400) foot restriction. This exemption, however, does not include Class "B" Retailer's Licenses. Additionally, D.C. Official Code § 25-314(b)(3) waives the four hundred (400) foot restriction if there exists within four hundred (400) feet a currently-functioning establishment holding a license of the same class at the time that the new application is submitted. In this case, the testimony of Investigator Blount revealed that there is not another Class "B" establishment located within four hundred (400) feet. As a result, the Applicant's request for a new Class "B" Retailer's License does not qualify for either of these two exceptions.

Safeway, Inc.
t/a Safeway
September 8, 2004

ORDER

THEREFORE, it is hereby **ORDERED** on this 8th day of September 2004, that the application for a new Class "B" Retailer's License filed by Safeway, Inc., t/a Safeway, 1855 Wisconsin Avenue, N.W., Washington, D.C., be and the same is hereby, **DENIED**.

District of Columbia
Alcoholic Beverage Control Board

Charles A. Burger
Charles A. Burger, Chairperson

Not Voting
Vera M. Abbott, Member

Audrey E. Thompson
Audrey E. Thompson, Member

Judy A. Moy
Judy A. Moy, Member

Not Voting
Peter B. Feather, Member

Pursuant to 23 DCMR § 1719.1 (April 2004), any party adversely affected may file a Motion for Reconsideration of this decision within ten (10) days of service of this Order with the Alcoholic Beverage Regulation Administration, 941 North Capitol Street, N.E., Suite 7200, Washington, D.C. 20002.

Also, pursuant to section 11 of the District of Columbia Administrative Procedure Act, Pub. L. 90-614, 82 Stat. 1209, D.C. Official Code § 2-510 (2001), and Rule 15 of the District of Columbia Court of Appeals, any party adversely affected has the right to appeal this Order by filing a petition for review, within thirty (30) days of the date of service of this Order, with the District of Columbia Court of Appeals, 500 Indiana Avenue, N.W., Washington, D.C. 20001. However, the timely filing of a Motion for Reconsideration pursuant to 23 DCMR § 1719.1 (April 2004) stays the time for filing a petition for review in the District of Columbia Court of Appeals until the Board rules on the motion. See D.C. App. Rule 15(b).

SEP 17 2004

Office of the Secretary of the
District of Columbia

Notice is hereby given that the following named persons have been appointed as Notaries Public in and for the District of Columbia, effective on or after October 1, 2004.

Anderson, Leigh F.	Rpt	Energy Resources Intl 1015 18th St,NW#650 20036
Ballard, Stephen M.	Rpt	Heritage Title & Escrow 2000 Florida Ave,NW 20009
Bishop, William R.	Rpt	U S Internat'l Trade Comm 500 E St,SW#112 20436
Braxton, Phanelson A.	Rpt	Sughrue Mion 2100 Pa Ave,NW#800 20037
Brown, Edwina M.	Rpt	Treasury Dept/U S Mint 801 9th St,NW 20220
Buckingham, Susan	Rpt	G T Univ/Mission & Ministry 37th&O Sts,NW#113Healy 20057
Clarke, Cherylann	Rpt	Kirkland & Ellis 655 15th St,NW 20005
Crenshaw, Denise	Rpt	Deso Buckley Stien 1828 L St,NW#660 20036
Farrar, Donna J.	Rpt	U L L I C O 1625 I St,NW 20006
Feldman, Jan Cohen	Rpt	ICMA Retirement Corp 777 N Cap St,NE#600 20002

Howard, Judith W.	Rpt	A A R P 601 E St,NW 20049
Ingraham, Gwendolen C.	Rpt	Louis Berger Group 2300 N St,NW#800 20037
Jenkins, Richard G.	Rpt	Jenkins Realty 1234 Franklin St,NE 20017
Loutan, Christiana	Rpt	Mundark Management 410 Kennedy St,NW#102 20011
Mercer-Jones, Donna	Rpt	LeBoeuf Lamb et al 1875 Conn Ave,NW#1200 20009
Mimms-Bolden Jo Anne	Rpt	Amer Council/Life Insurers 101 Const Ave,NW#700 20001
Ogren, Tracy	Rpt	Dept of Navy/N C I S 716 Sicard St,SE#2000 20388
Robinson, Angel R.	Rpt	Chadbourne & Parke 1200 N H Ave,NW#300 20036
Satterfield, Denise	Rpt	Self Help 910 17th St,NW#500 20006
Stewart, Imogene P.	Rpt	1900 Irving St,NE#202 20018
Swirling, Scott	Rpt	S R S Associates 401 9th St,NW#1000 20004
Williams, Veronica C.	Rpt	800 Southern Ave,SE#803 20032
Witherow, Mary E.	Rpt	Kelley Drye Warren 1200 19th St,NW#500 20036

DEPARTMENT OF HUMAN SERVICES
FAMILY SERVICES ADMINISTRATION
COMMUNITY SERVICES BLOCK GRANT PROGRAM

NOTICE OF AVAILABILITY OF 2005 CSBG STATE PLAN AND APPLICATION FOR REVIEW AND COMMENT

The Director, Department of Human Services ("Department"), pursuant to the requirements of the *Omnibus Budget Reconciliation Act of 1981 (*Title VI, Chapter 8, Part 4, Subchapter C, Subtitle B, Section 675 (Public Law 97-35), as amended, makes available, a copy of the fiscal year 2005 Community Services Block Grant state plan and application for public review and comments at the following locations from September 1, 2004 through October 15, 2004:

Department of Human Services
Family Services Administration
Community Services Block Grant Program
64 New York Avenue, N.E., 6th Floor
Washington, D.C. 20002

United Planning Organization
301 Rhode Island Avenue, N.W.
Washington, D.C. 20001

Martin Luther King, Jr. Memorial Library
Public Comments Section, 3rd Floor
901 G Street, N.W.
Washington, D.C. 20001

Public comments shall be received from CSBG customers and other interested individuals on issues relating to the reduction of poverty in the District of Columbia, and on methods to assist low-income individuals and families to:

- Secure and retain meaningful employment;
- Attain an adequate education;
- Make better use of available income;
- Obtain and maintain adequate housing and secure a suitable living environment;
- Remove obstacles and solve problems which inhibit the attainment of self-sufficiency; and
- Achieve greater participation in the communities in which they live.

If you have questions, or require additional information, please contact the CSBG office at (202) 671-4720.

DISTRICT OF COLUMBIA COMMISSION ON JUDICIAL DISABILITIES AND TENURE

Judicial Tenure Commission Begins Review of Judge For Senior Status

This is to notify members of the bar and the general public that the Commission is reviewing the qualifications of Senior Judge William C. Pryor of the District of Columbia Court of Appeals who has requested a recommendation for reappointment as a Senior Judge.

The District of Columbia Retired Judge Service Act P.L. 98-598, 98 Stat. 3142, as amended by the District of Columbia Judicial Efficiency and Improvement Act, P.L. 99-573, 100 Stat. 3233, §13(1) provides in part as follows:

> "...A retired judge willing to perform judicial duties may request a recommendation as a senior judge from the Commission. Such judge shall submit to the Commission such information as the Commission considers necessary to a recommendation under this subsection.
>
> (2) The Commission shall submit a written report of its recommendation and findings to the appropriate chief judge of the judge requesting appointment within 180 days of the date of the request for recommendation. The Commission, under such criteria as it considers appropriate, shall make a favorable or unfavorable recommendation to the appropriate chief judge regarding an appointment as senior judge. The recommendation of the Commission shall be final.
>
> (3) The appropriate chief judge shall notify the Commission and the judge requesting appointment of such chief judge's decision regarding appointment within 30 days after receipt of the Commission's recommendation and findings. The decision of such chief judge regarding such appointment shall be final."

The Commission hereby requests members of the bar, litigants, former jurors, interested organizations and members of the public to submit any information bearing on the qualifications of Judge Pryor which it is believed will aid the Commission. The cooperation of the community at an early stage will greatly aid the Commission in fulfilling its responsibilities. The identity of any person submitting materials will be kept confidential unless expressly authorized by the person submitting the information.

All communications should be mailed, faxed, or delivered by **November 5, 2004**, and addressed to:

District of Columbia Commission on Judicial
Disabilities and Tenure
Building A, Room 312
515 Fifth Street, N.W.
Washington, D.C. 20001
(Telephone: (202) 727-1363)
(FAX: (202) 727-9718)

The members of the Commission are:

Ronald Richardson, Chairperson
Hon. Gladys Kessler, Vice Chairperson
Mary E. Baluss, Esquire
Gary C. Dennis, M.D.
Eric H. Holder, Jr., Esquire
William P. Lightfoot, Esquire

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 16998-A of Advisory Neighborhood Commission 5B, pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decision of David Clark, Director, Department of Consumer and Regulatory Affairs (DCRA) for the issuance of Building Permit No. B425438, for the renovation of a warehouse for use as a community corrections center. Appellant alleges that DCRA erred by issuing the building permit as the proposed use will allegedly be operated as a community-based residential facility (halfway house) and therefore in violation of the prohibition of new residential use in a C-M District pursuant to section 801. The subject property is located in the C-M-2 District at premises 2210 Adams Place, N.E. (Square 4259, Parcel 154/81).

HEARING DATES: April 22, 2003, May 20, 2003, June 17, 2003, July 8, 2003, and July 22, 2003

DECISION DATE: September 9, 2003

DATE OF DECISION ON RECONSIDERATION: May 4, 2004

ORDER DENYING RECONSIDERATION AND STAY

In Appeal No. 16998, appellant Advisory Neighborhood Commission ("ANC") 5B ("Appellant") claimed that the Department of Consumer and Regulatory Affairs ("DCRA") had erroneously issued a building permit allowing a prohibited community-based residential facility ("CBRF") in a C-M zone. Appellee DCRA claimed that it had acted properly in issuing the permit pursuant to 11 DCMR § 801.7(k), which permits a "temporary detention or correctional institution on leased property for a period not to exceed three (3) years." DCRA alleged that an 801.7(k) institution was a type of CBRF permitted in a C-M zone. Intervenor/property lessor Bannum, Inc. claimed that its facility was not a CBRF, but a community corrections center ("CCC"), and that therefore the use fell squarely within § 801.7(k).

The final order of the Board of Zoning Adjustment ("Board") granting Appeal No. 16998 was issued on March 31, 2004 ("Order"). The Order explained, in detailed findings of fact and conclusions of law, that although the Board found Appellant's theory of error unpersuasive, it nonetheless determined that DCRA had erred in issuing the building permit. The Board ultimately concluded that the proposed facility was neither a CBRF nor a temporary detention or correctional institution under § 801.7(k) of the Zoning Regulations.

On April 5, 2004, DCRA timely moved for reconsideration of the Order and for a stay of the Board's final decision while reconsideration was pending. On April 13, 2004, Bannum timely moved for reconsideration and for a stay of the final decision while reconsideration was

pending.[1] *See,* 11 DCMR § 3126.2. On April 21, 2004, Appellant filed an opposition to both of these motions. *See,* 11 DCMR § 3126.5.

THE MOTIONS FOR A STAY

Both DCRA's and Bannum's Motions for Reconsideration purport to also ask for "a stay of the Order's effect while this reconsideration and any related motions or hearings are pending." The stay requests were made because neither the filing nor the granting of a motion for reconsideration automatically stays the effect of a Board order. 11 DCMR § 3126.9.

A movant needs to make four showings in order for a stay to be granted: that it is likely to succeed on the merits, that denying the stay would cause irreparable injury, that granting the stay would not harm other parties, and that the public interest favors granting a stay. *See, eg., Barry v. Washington Post,* 529 A.2d 319, 320-321 (D.C. 1987). Neither DCRA's nor Bannum's Motion set forth these factors or discussed them in any way. Neither Motion explained why a stay was requested or claimed to be necessary. In fact, neither Motion addressed the issue of a stay at all. The Board, therefore, denies the Motions for Stay.

THE MOTIONS FOR RECONSIDERATION

A motion for reconsideration must specifically state in what way the Board's decision is erroneous, the grounds for reconsideration, and the relief sought. 11 DCMR § 3126.4. To be persuasive, such a motion should present more than a re-hashing of the original arguments made. *See, e.g., Washington Gas Light Co. v. Public Service Comm'n.,* 483 A.2d 1164, 1168, n. 11 (D.C. 1984).

Bannum' s Motion for Reconsideration

Bannum makes three arguments in its Motion. First, Bannum claims that since the Board found Appellant's theory of error unpersuasive, it should have denied the appeal outright. This is incorrect. The question on appeal is whether DCRA erred, not whether the Appellant presented the alleged error properly. The Board concluded that DCRA erred in its interpretation of the zoning regulations based on the record and may reject the specific theory of error proffered by the Appellant. As the Order stated, "the Zoning Act intends for the [Board] to exercise an in-depth second level of review to ensure that a non-compliant use or structure is not inadvertently permitted." Order at 8. If the Board determines that DCRA erred, the Board must so find, regardless of whether this finding is based on the Appellant's stated grounds for appeal or on the Board's own in-depth second level of review.

Second, Bannum claims that the Board determined that the Federal Government, specifically the U.S. Attorney General and the Federal Courts, either misrepresented that a CCC is a detention or correctional institution, or, "does not know what [it] is talking about" with respect to this conclusion. The Board never stated anything to this effect. There is no finding in the Order that

[1]On April 14, 2004, Bannum filed a petition for review of the Order with the District of Columbia Court of Appeals and on June 1, 2004, Bannum filed with the same court a petition for review of the Board's May 4, 2004 oral decision to deny reconsideration and stay of the Order.

the Federal Government misrepresented anything or "did not know what it was talking about." Instead, the Conclusions of Law in the Order make it clear that a CCC is not a defined term in the zoning regulations nor in Webster's Dictionary, and that it is not what was envisioned by the Zoning Commission when it promulgated § 801.7(k). The Board did not conclude that a CCC can never be a detention or correctional facility, but merely that Bannum's facility is not the type of detention or correctional facility which is sanctioned by § 801.7(k).

Third, Bannum claims that the Board acted beyond its authority and assumed a legislative role. The Board reads Bannum's Motion to mean that when the Board looked beyond the wording of the regulation to try to determine the meaning of the word "temporary" it somehow found the word "temporary" vague and therefore, somehow treated § 801.7(k) as unconstitutional. A reading of the Order shows the fallacy of this assertion. The Board made no finding that the word "temporary" was impermissibly vague. In the Conclusions of Law, the Order merely states that "temporary" and "for a period not to exceed three years," both of which appear in § 801.7(k), must be read to have separate meanings. In this case, a "temporary" use must not exist for more than three years and the record shows that Bannum intended its use to exist for more than three years.

The Board concludes that Bannum fails to make a persuasive argument for reconsideration of the Board's decision.

DCRA's Motion for Reconsideration

DCRA makes four arguments for reconsideration. First, DCRA argues that the Board is in error in concluding that a 150-bed facility could never be an adult rehabilitation home because it is just too large. Second, DCRA asserts error in the Board's statement that there is no indication as to what DCRA thought a CCC was or why DCRA assumed a CCC was a § 801.7(k) facility. Third, DCRA contends that the Board erred in concluding that the residents of Bannum's facility are there for the purpose of being freed, not confined, and that, while they are there, they "can pretty much come and go as they please." Fourth, DCRA asserts that the Board erred in finding that Bannum's facility was not intended to be temporary.

DCRA's first assertion of error

The Board stands by its assertion that a 150-bed facility "is simply too large to be considered an adult rehabilitation home." *See,* Order at 13. The Board chose its words carefully. It did not say that no CBRF could have 150 beds, but that no adult rehabilitation facility could have 150 beds. CBRF's are permitted with no numerical size limit in C-3, C-4, and C-5 districts, but adult rehabilitation homes were never intended to be particularly large facilities. As stated in the Order at 13, up until C-3 zones, the largest adult rehabilitation home permitted could house only 20 persons. Yet, in those same zones, health care facilities for up to 300 people are permitted. The fact that the Zoning Commission permitted health care facilities with a 300-person maximum in the same zones in which it permitted adult rehabilitation homes with only a 20-person maximum shows that adult rehabilitation homes were never meant to approach a size much above 20 residents. Clearly, an adult rehabilitation home for 150 persons was not intended by the Zoning Commission in 1981.

This conclusion is echoed by the statements of Mr. Parsons, the Zoning Commission member who sat on this case with the Board, and who also sat on the Commission in 1981 when the CBRF regulations were debated and promulgated. During the September 9, 2003 decision meeting, Mr. Parsons stated:

> Our dilemma is that the Zoning Commission placed these [adult rehabilitation homes] in residential areas as a more amenable place to perform that transition, [back into society] limited them to 25. Certainly, the authority of this Board or others is not to say, well, probably the Zoning Commission also meant 300 people or 400 people, and therefore, it should be in a commercial district. It just doesn't wash.

September 9, 2003 meeting transcript at 62, lines 17-24. Later in the deliberation, Mr. Parsons, again discussing adult rehabilitation homes, stated:

> [t]hey are limited to a certain size ... we spent a great deal of time on this in the 1980s as to – I mean, we considered CBRFs (*i.e.*, adult rehabilitation homes) up to 150-200 people in size and determined, no. One, they don't belong in residential zones and, two, it isn't good for the people who are in them.
>
> That is, they are supposed to be mainstreaming with society and not clinically assembled and released on a daily basis en masse. So I can recall the Commission deliberating on this for a long period of time, on what is a size that fits the purpose of these facilities.

Id., at 72, line 3 and lines 11-21.

It is clear from Mr. Parsons' statements that the Zoning Commission had in mind smaller, "home-like" facilities when it created adult rehabilitation homes. The Board has no independent authority to promulgate or change the Zoning Regulations. D.C. Official Code § 6-641.07(e) (2001). Only the Zoning Commission can do this and the Board is bound to follow the language and intent of the Commission. If the Board were to permit adult rehabilitation homes of 150 beds, it would be exceeding its authority by ignoring the intent of the Commission and re-writing the Zoning Regulations.

DCRA also states that the Board misparaphrases Zoning Commission Order No. 347 by stating that CBRF's were "intended" to be, rather than "encouraged" to be, "smaller facilities, approximating the size and characteristics of families." The Board concludes that this mischaracterization is not dispositive, or even particularly important. As explained above, the Zoning Commission did not contemplate adult rehabilitation homes of the size Bannum proposes here. Instead, the Zoning Commission favored "smaller facilities, approximating the size and characteristics of families."

Even if DCRA is correct that this facility was an Adult Rehabilitation Home, the Board would still grant the appeal, since the order also concluded that a CBRF is not a matter of right use in a CM zone.

DCRA's second assertion of error

DCRA takes issue with the statement in the Order, at 14, that "[t]here is no indication as to what DCRA thought a CCC was, or why it thought a CCC was just another name for a temporary detention or correctional institution." The statement, however, is correct. DCRA never adequately determined whether Bannum's proposed use, a CCC, is just another way of describing the use contemplated by § 801.7(k). Section 801.7(k) had never been implemented before. The use it represents was undefined, and therefore, uncertain. Bannum was proposing a "CCC," also an undefined use in the Zoning Regulations. DCRA issued the building permit(s) appealed here based on the two concurrence letters, drafted by Bannum's then-attorney, and concurred in by the Zoning Administrator. These letters are cited by DCRA in its Motion for Reconsideration as sufficient to put DCRA on notice as to what sort of facility Bannum intended to operate. In fact, DCRA appears to argue that anyone who saw the concurrence letters would naturally assume that the facility they describe falls within § 801.7(k). In 1972, however, when § 801.7(k) was enacted, the term CCC did not yet exist. Therefore, it would have been impossible for the Zoning Commission in 1972 to have meant to include a CCC within the ambit of § 801.7(k).

More importantly, however, DCRA is misconstruing the standard applicable in this appeal to DCRA's actions. The question is not whether the record before DCRA was adequate to make a determination, but whether such a determination was correct. The Board concluded that DCRA's determination that Bannum's proposed CCC facility falls within § 801.7(k) is incorrect. Even if DCRA had reached this determination after going to great lengths to establish what a CCC is, it would still be incorrect.

DCRA's third assertion of error

DCRA next contends that the Board placed undue emphasis on the freedom of movement of the residents of Bannum's facility. DCRA's motion states that the Board's findings as to the degree to which the residents are free to come and go are not supported by substantial evidence. The Board must again disagree. There is evidence in the record of the constraints on the absolute freedom of movement of the residents, but there is also evidence that they are permitted quite a bit of unrestricted movement. They are certainly not under constant surveillance. Bannum's facility has no locks, bars, physical restraints, guards, or even a secure perimeter. Finding of Fact No. 45. With permission, the residents of the facility may leave for any number of reasons, such as to go to work, to visit family members, or to attend classes. Finding of Fact No. 47. Residents can also get weekend passes and furloughs for more than two consecutive nights or for trips of more than 100 miles. Finding of Facts No's. 48 and 49. Moreover, the ultimate goal of Bannum's facility is to free its residents, not to keep them confined.

Even with all this freedom of movement, it may be possible to consider a facility a detention or correctional institution, but the Board concludes, as it did in its Order, that such a facility is not

the type of detention or correctional institution intended by § 801.7(k). A § 801.7(k) facility was intended to relieve the prison overcrowding which existed at the time of the enactment of the section. At that time, the D.C. Jail had a population cap imposed on it and the § 801.7(k) facility was to temporarily house inmates who would otherwise have been housed in the jail. Such a facility was not meant to be a stepping-stone between confinement in a jail and freedom in society.

DCRA also addresses the Board's statement that CCC residents on probation are not "being confined by the courts." DCRA states that residents on probation are confined pursuant to court order. Probation, however, is not the same as "detention" or "confinement." Probation is actually a suspension of a sentence. It is chosen or imposed as an alternative to a sentence of incarceration, *i.e.*, "detention" or "confinement." That is why if an individual violates his probation, he does not get credit for time served, as would someone who had been incarcerated. *See, e.g., Thomas v. U.S.*, 327 F.2d 795 (10th Cir. 1964), *cert.* denied 377 U.S. 1000 (1964). Probation can have conditions associated with it, such as where the individual is to reside. *See,* 18 USCS § 3563(b). But if one's probation requires that he live within a specified judicial district or that he live with his mother, that does not make the judicial district or his mother's home a place of "detention" or "confinement."

The fact that Bannum's facility houses individuals on probation militates against its being a § 801.7(k) facility, which is meant to house the overflow of incarcerated inmates from other institutions. Individuals on probation are not "incarcerated." The same fact also militates against Bannum's facility being an adult rehabilitation home, as the definition for that use limits it to individuals who are either over 16 and charged with a felony, or over 21 and under pre-trial detention or sentenced court orders. An individual on probation is not "under pre-trial detention" and is not serving a "sentence," but is fulfilling a suspension of a sentence. Therefore, he would not fall within any of these categories.

DCRA's fourth assertion of error[2]

DCRA last asserts that the Board erred in concluding that Bannum did not intend a temporary facility. There was evidence on both sides of the question as to whether Bannum intended its facility to be both temporary and to exist for a maximum of three years. Taking the record as a whole, the Board concluded that Bannum intended its use to be permanent, or at least, for more than three years. DCRA makes the argument that, after three years, Bannum could have applied for a use variance to permit the continuation of the use. This only serves to bring home more forcefully that Bannum was hoping/intending to establish this use at this location for more than the permitted three year maximum. The Board sees no reason to change the conclusion reached in its Order.

APPELLANT'S OPPOSITION TO THE MOTIONS FOR RECONSIDERATION AND STAY

[2]DCRA asserts in its Motion, at 7, n. 2, that the July 8, 2003 hearing transcript is only 294 pages long, but that Finding of Fact No. 28 refers to pages 359 and 377. The page references in the Finding of Fact are to the page numbers in the transcript for the Board's entire public hearing held on July 8, 2003, which is 418 pages long. The page references are not to those pages of the transcript which contain only the proceedings in Appeal No. 16998. Therefore, the page references in the Finding of Fact are correct.

On April 21, 2004, Appellant filed an Opposition to both the Motions for Reconsideration. The Opposition was timely as to Bannum's Motion, but not as to DCRA's Motion. *See,* 11 DCMR §§ 3126.5 and 3110. The Board will therefore consider the Opposition timely in order to discuss it briefly.

The Opposition is actually an opposition and a de facto motion for reconsideration. After agreeing with the Order that Bannum's facility is not a § 801.7(k) facility, the Opposition urges the Board to "revisit" its decision that the facility is not a CBRF. The Opposition's discussion of why the facility is not a § 801.7(k) facility asserts no error on the Board's part, nor does it present new information or arguments and so requires no comment here. As for the Opposition's proposition that the Board should revisit its decision that the facility is not a CBRF, so far as that is a motion for reconsideration, it is untimely, and the Board need not address it. *See,* 11 DCMR § 3126.2.

CONCLUSION

The Board has carefully considered all the claimed errors and the arguments put forth by both Bannum and DCRA in their respective Motions for Reconsideration and Stay. Although there was merit to some of DCRA's contentions, the Board is not persuaded to reconsider its decision and Order in this case. Accordingly, the Motions for Reconsideration of both Bannum and DCRA are hereby **ORDERED DENIED.** So far as the Opposition filed by Appellant purports to put forth arguments for reconsideration, it is hereby **ORDERED DENIED** as untimely.

VOTE: (on both Motions for Reconsideration): 4-1-0 (Geoffrey H. Griffis, David A Zaidain, Curtis L. Etherly, Jr., and John G. Parsons, to deny. Ruthanne G. Miller to grant.)

The Motions for Stay of the Board's decision of both Bannum and DCRA are hereby **ORDERED DENIED** as moot.

VOTE: (on both Motions for Stay): 5-0-0 (Geoffrey H. Griffis, David A Zaidain, Curtis L. Etherly, Jr., John G. Parsons, and Ruthanne G. Miller, to deny.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: AUG 26 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL. LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Appeal No. 17054 of Henry P. Sailer, et. al., pursuant to 11 DCMR §§ 3100 and 3101, from the administrative decisions of the Department of Consumer and Regulatory Affairs (DCRA) in the issuance of Building Permit No. B448548 dated January 29, 2003, Building Permit No. B451476 dated May 20, 2003, and Building Permit No. B452193 dated June 13, 2003, for the construction of a new single-family detached dwelling and pool, allegedly in violation of lot occupancy, rear yard, ground coverage, and tree removal requirements of the Zoning Regulations in the Chain Bridge Road/University Terrace Overlay (CBUT)/R-1-A zone, at premises 3101 Chain Bridge Road, N.W. (Square 1427, Lot 870).

HEARING DATES: October 21, 2003, January 27, 2004, February 3, 2004

DECISION DATES: November 4, 2003, November 18, 2003, November 25, 2003, March 2, 2004

DECISION AND ORDER

This appeal was filed with the Board of Zoning Adjustment (the Board) on July 2, 2003 challenging DCRA's decisions to approve a building permit dated January 29, 2003 to construct a single family home at 3101 Chain Bridge Road, N.W., a related pool permit dated May 20, 2003, and a revised building permit dated June 13, 2003. Following a public hearing in this matter, the Board voted to dismiss the appeal of the January 29, 2003 building permit as untimely, to deny the appeal as to the May 20, 2003 pool permit, and to grant the appeal as to the revised June 13, 2003 building permit.

PRELIMINARY MATTERS

Notice of Appeal and Notice of Public Hearing

The Office of Zoning scheduled a hearing on the appeal for October 21, 2003. In accordance with 11 DCMR § 3113.4, the Office of Zoning mailed notice of the hearing to the Appellants, the ANC 3D (the ANC for the area concerning the subject property), the property owner, and DCRA.

Parties

The Appellants in this case are Henry P. Sailer, Lisa S. Kelly, Steven S. Wolf, Arthur L. Levi, Veronica and Bruce Steinwald, Veronique LaGrange, and Benoit Blarel (the Appellants). Appellants initially represented themselves, but later retained Patton Boggs, LLP, as counsel. Brian Logan, the owner of the subject property (the Owner or Mr. Logan), was represented by

Persons/Entities in Support of the Appeal
The ANC and the Palisades Citizens Association (the Association) wrote in support of the appeal, and the Association's representative, Judith Lanius, testified in support of the appeal.

Preliminary Matters
Prior to the public hearing, the Owner filed a motion to dismiss the appeal as untimely. Appellants and the ANC opposed this motion; however, the Association took no position on the timeliness issue. DCRA joined in the Owner's motion to dismiss, and the Board heard oral argument from the parties on October 21, 2003. A decision on the motion was set for November 4, 2003, then rescheduled, first for November 18, 2003, then for November 25, 2003. During a special public meeting on November 25, 2003, the Board voted to dismiss the appeal of all issues, except those relating to the May 20, 2003 pool permit and the June 20, 2003 revised building permit. A hearing on these remaining issues was set for January 27, 2004, then rescheduled and held on February 3, 2004.

The Positions of the Parties on the Remaining Issues
The Appellants maintain that the pool permit was issued in error because the cachment tank of proposed pool would unlawfully extend into the rear yard and its stairs would unlawfully extend into the side yard. The Owner and DCRA contend that the proposed pool and stairs are permitted encroachments because they are within the maximum allowable height under the Zoning Regulations.

The Appellants also maintain that the revised building permit was issued in error because it allowed a "pervious" driveway to an accessory garage, and that both the driveway and garage violate various requirements of the Zoning Regulations. For example, Appellants maintain that the driveway and drive courts associated with the garage must be paved with impervious surfacing; and that even were this flaw to be corrected, the impervious surfacing would exceed the maximum allowed under the Regulations. The Owner and DCRA contend that since the parking space in the garage is not required parking under the Regulations, the legal requirements related to the driveway and garage (and cited by Appellants) are not applicable.

FINDINGS OF FACT

The Property
1. The subject property is located at 3101 Chain Bridge Road, N.W., Square 1427 in a portion of the R-1-A zone that is subject to the Chain Bridge Road/University Terrace (CBUT) Overlay. The CBUT Overlay (provided for at 11DCMR § 1565 et. seq.) is designed to preserve and enhance the park-like setting of the Chain Bridge Road/University Terrace area by regulating alteration or disturbance of terrain, destruction of trees, and ground coverage of permitted buildings and other impervious surfaces, and by providing for widely spaced residences.

The Appellants
2. The Appellants are the Owner's neighbors. Arthur S. Levi owns a home at 3045 Chain Bridge Road, which is immediately to the west of the subject property. At the time of the public

hearing Mr. Levi resided in France and rented his home to tenants. Henry P. Sailer resides at 3111 Chain Bridge Road, which is immediately to the east of the subject property. Veronica and Bruce Steinwald live next door to Mr. Sailer – one house removed from the subject property. Lisa Kelly and Steven Wolf live at 3117 Chain Bridge Road, immediately to the east of the Steinwalds, and two houses down from the subject property. Veronique LaGrange and Benoit Blarel live at 3106 Chain Bridge Road, directly across the street from the subject property

The Main Permit and Construction History at the Property

3. The Owner applied for a permit to remove some of the trees from his property on or about May 9, 2001. The application included a "Tree & Slope Information Form", an "Affidavit: Tree & Slope Protection (TSP) Overlay Districts", and a report from a certified arborist stating that certain trees were diseased (Exhibit 25). He received Building Permit No. B432497 dated August 8, 2001 (the tree permit) allowing him to remove the trees. These permits were renewed on August 6, 2002 and February 5, 2003.

4. On or about November 27, 2001, the Owner applied for a permit to construct a new single-family home with a swimming pool and two-story accessory building in the rear yard. The new house would replace an existing house at the property. DCRA issued building permit No. B448548 (the main building permit) on January 29, 2003 to build a "new single family house as per plat and plans".

5. The Owner demolished the existing house at the property on February 8, 2003, after receiving Building Permit No. B448687 for an emergency raze of the house. During that time, a certified diseased tree and other trees were also removed.

6. The Association, through Judith Lanius, complained to DCRA that the existing house had been demolished without a permit and that a healthy "protected tree" had been improperly removed. As a result, DCRA Inspector Stanley Neal visited the property on February 10, 2003 and issued a "stop work order" halting construction. DCRA lifted the stop work order on or about March 21, 2003 following a letter from the owner's counsel that the stop work order was groundless, and construction resumed on or about March 24, 2003.

7. The Owner obtained other permits related to the construction of the new home, including Building Permit Number B451476 issued May 20, 2003, authorizing the construction of an in-ground pool.

The Pool Permit

8. The proposed swimming pool is an infinity pool in which some of the water from the main pool structure is allowed to spill over the lip of the pool into a reservoir below. The function of the reservoir is to catch the overflow and re-circulate it into the main swimming pool.

9. The pool was first proposed when the Owner submitted a building plat dated November 14, 2001 (the initial plat) as part of the application for the main permit. This plat showed the proposed house, a "new 2 story accessory building garage/studio," a pool, and all of the proposed

driveways, steps and walkways. The plat also depicted the measurements of the rear and side yards.

10. The Owner's pool contractor later submitted the initial plat and additional structural drawings as part of the application for the pool permit. There were no changes in the dimensions and location of the pool after DCRA approved and issued the main permit (Exhibit 38).

11. The plat and drawings show that the rear wall of the main swimming pool is 25 feet 3 inches measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line (Exhibit 38).

12. The plat and drawings show that the rear wall of the main swimming pool is approximately 6 feet above grade, but the lower reservoir is only 4 feet above grade (Exhibit 38).

13. Leon Paul, the DCRA Zoning Technician, reviewed the location and size of the pool during the review of the main building permit and concluded that the pool and stairs did not exceed 4 feet above grade at any point and that the minimum rear yard and side yard requirements had been satisfied.

14. The Board credits the testimony of the Owner's zoning expert, Armando Lourenco, regarding the pool, rear yard and side yard measurements. Mr. Lourenco testified that based upon his review of the submitted plat and drawings, the proposed pool was no more than 4 feet above grade at any point.

The Revised Permit

15. The initial plat (upon which the main permit was based) showed a two story accessory building to be located on the property behind the main house and adjacent to the pool and the drive court. The accessory building, termed a "garage/studio" was to be surrounded by terraces and plantings. Although the initial plat did not depict the building as accessible by vehicle from the driveway or the drive court, it did show a parking space on the lower level.

16. On or about June 13, 2003, the Owner's architect submitted an application to revise the main building permit. The stated purpose was to "[r]evise [p]ermit #B448548 [the main permit] to show pervious drive to the accessory garage structure." The permit was issued that same day.

17. As part of the application, the Owner submitted a revised building plat dated June 5, 2003 (the revised plat). In contrast to the initial plat, the revised plat showed that the accessory garage was accessible by a vehicle from the driveway and added a driveway ramp leading from the gravel drive court to a lower drive court adjacent to the accessory garage. It also depicted the surface of the driveway and lower drive court as being "pervious" and made other minor changes that are not relevant to this appeal. The term "pervious" is not used in the Zoning Regulations. However, the Board interprets it to mean the opposite of "impervious", a term that is used in the Regulations and defined to describe a surface that impedes the percolation of water and plant growth.

18. The revised plat shows an impervious paved main drive entry leading from Chain Bridge Road to a driveway. At the point the driveway enters the side yard, it is paved with impervious drive tracks that measure 7 feet between the outside edges of the paved tracks. The driveway continues through the side yard of the house to a paved drive and pervious drive court behind the house. There is also a drive ramp leading from the drive court to the lower drive court adjacent to the accessory garage. The drive ramp is shown as 7 feet wide and 23 feet long and is shown as "pervious."

19. According to the Owner's calculations, there is 7,818 square feet of total impervious surface coverage on a lot of 15, 654 feet, slightly less than fifty percent of the lot. The impervious surface coverage is about 10 square feet shy of the fifty percent.

Appellants' Knowledge of the Conditions Complained Of

20. The Owner did not establish to the Board's satisfaction that Appellants knew or should have known about the main permit and approvals when the permit was issued on January 29, 2003.

21. The Owner did not establish to the Board's satisfaction that Appellants knew or should have known about the main permit and approvals on February 8, 2004, when the existing house was demolished.

22. Based upon the following facts, the Board is persuaded that the Appellants knew or should have known about the main permit approvals by March 24, 2004:

(a) One of the Appellants, Henry P. Sailer, testified that he knew about the construction activities as early as March 24, 2003.

(b) On or about March 5, 2003, an article appeared in a local newspaper (the Palisades News) describing the demolition activities of February 8, 2003. The article stated that the tree removal was a violation of the Overlay zone and that permits had been mistakenly issued. The newspaper also noted that a building permit had been issued for "3101 Chain Bridge Road, new home $1,250,000, Brian Logan." (Exhibit 25).

In late March or early April, 2003 another appellant, Arthur S. Levi. while in France. contacted Leon Paul, a DCRA zoning technician by e-mail, seeking clarity from DCRA as to what had changed on the plans in order for them to be approved as in compliance with the Zoning Regulations. According to Mr. Paul, Mr. Levi's e-mail indicated that he had a copy of the original permit at that time because his comments referred to that permit.

23. Although it may have been difficult for the Appellants to obtain details from DCRA regarding the permits and plans, there is no evidence that DCRA's actions substantially impaired Appellants' ability to file the subject appeal.

24. Appellants filed this appeal on July 2, 2003, approximately 100 days after March 24, 2003, the date that they knew or should have known of the issuance of the original permit, but less than 60 days after the issuance of the revised permit and the pool permit.

CONCLUSIONS OF LAW

The Motion to Dismiss.

The District of Columbia Court of Appeals has held that "[t]he timely filing of an appeal with the Board is mandatory and jurisdictional." *Mendelson v. District of Columbia Board of Zoning Adjustment*, 645 A.2d 1090, 1093 (D.C. 1994). The Board's Rules of Practice and Procedure (11 DCMR, Chapter 31) require that all appeals be filed within 60 days of the date the person filing the appeal had notice or knew of the decision complained of, or reasonably should have had notice or known of the decision complained of, whichever is earlier. 11 DCMR § 3112.2(a). This 60-day time limit may be extended only if the appellant shows that: (1) "There are exceptional circumstances that are outside the appellant's control and could not have been reasonably anticipated that substantially impaired the appellant's ability to file an appeal to the Board; and (2) "The extension of time will not prejudice the parties to the appeal." 11 DCMR 3112.2(d).

This appeal, filed July 2, 2003, was untimely filed as to the main permit and its related approvals. As stated in the Findings of Fact, Appellants knew or should have known about the permit approvals by March 24, 2003. Thus, under section 3112.2(a) of the Regulations, the appeal should have been filed within 60 days of that date, or by late May, 2003. Instead, it was filed in July, 2003, approximately 100 days after the Appellants are charged with notice of the conditions complained of. While the Appellants may have had difficulties in preparing their actual case, the Board does not find any exceptional circumstances outside of their control that impaired their ability to file a timely, good faith appeal with respect to the main permit approvals.

The appeals of the pool permit (issued on May 20, 2003) and the revised permit (issued on June 13, 2003) were timely filed within 60 days of the conditions complained of and are properly before the Board.

Therefore the Board grants the motion to dismiss that portion of the appeal related to the main permit, but denies the motion to dismiss with respect to pool permit and the revised permit.

The Merits of the Appeal

The Pool Permit

The Board concludes that DCRA had ample legal basis for issuing the pool permit, and that aspect of the appeal is therefore denied. The rear yard does not exceed the minimum size required under the Regulations, as claimed by the Appellants. In a residential district, a rear yard must be provided for each structure. The minimum rear yard for the property, which is located in the R-1-A District, is 25 feet. 11 DCMR § 404.1. As stated above, the plat shows that the rear

wall of the main swimming pool is 25 feet 3 inches measured from the mean horizontal distance from the rear line of the rear wall of the pool and the rear lot line (Finding of Fact 11).

Nor did the permit approve a pool that encroached into the rear yard or side yard, as claimed by the Appellants. Section 2503.2 of the Regulations permits structures less than 4 feet above grade to occupy a required yard. Under 11 DCMR § 199.1, a swimming pool is a structure (a structure is "anything constructed...the use of which required permanent location on the ground, or anything attached to something having a permanent location on the ground..."). As discussed above, the lower reservoir of the pool is only 4 feet above grade and the structure, including the stairs, is no more than 4 feet above grade at any point (Findings of Fact 12-14).

For these reasons, the Board denies that portion of the appeal that challenged DCRA's issuance of the pool permit.

The Revised Permit

The Board concludes that the revised permit was issued in error because the driveway's surface area should have been counted towards the Overlay's limitation on impervious surfaces, regardless of the Applicant's representation that the surface would be pervious. When so counted, the record indicates that the percentage of impervious surface on the site would exceed the amount allowed under the Overlay.

The Owner and DCRA both contend there is no requirement for the driveway to be impervious because it is a driveway to a parking space that is not required. They rely on sections 2101.1, 2117.3, 2117.4, 2117.8 and 2118.9 of the Regulations in support of their position that there are no specific access requirements for an "extra" parking space that is not required under the Regulations, and that the parking space within the garage is such an optional "extra" space. Section 2101.1 provides that only one off-street parking space is required for a single-family dwelling; and, according to the Owner, the "required space" at this property is located in the side yard[2], not within the accessory garage. They concede that sections 2117.3, 2117.4 and 2117.8 set forth standards for access driveways and parking spaces, and require impervious surfaces for both. However, the Owner and DCRA assert that these provisions apply only to "required spaces", not optional spaces.

However, the Board finds that even if this were a lawful pervious driveway, it should nevertheless have been treated as an impervious surface for the purpose of calculating impervious surfaces under the CBUT Overlay. Had the Zoning Administrator done so, he would have determined that the maximum impervious surface limitations of 11 DCMR § 1567.2 had been exceeded. In finding that pervious driveways should be deemed impervious surfaces for this calculation, the Board relies on three regulations and their underlying intent:

> 11 DCMR 199.1, the definitional section of the Zoning Regulations. defines an "impervious surface"as follows:
>
> > an area that impedes the percolation of water into the subsoil

[2] Parking spaces may be located in the side yard under 11 DCMR 2116.2.

> and impedes plant growth. Impervious surfaces include the footprints of principal and accessory buildings, footprints of patios, **driveways,** other paved areas, tennis courts, and swimming pools, and any path or walkway that is covered by impervious material. (39 DCR 1904) (emphasis added).

The Board reads this provision as indicating that all footprints of driveways are to be deemed impervious surfaces by definition , particularly when read in connection with 2500.5, governing private garages in an R-1-A or R-1-B District and the Overlay regulations set forth at 1565 et seq.

2500.5 states as follows:

> In an R-1-A or R-1-B District only, an accessory private garage may have a second story used for sleeping or living quarters of domestic employees of the family occupying the main building..

Pursuant to this regulation the only two- story buildings allowed in this District are accessory private garages. This regulation could be greatly abused if the features attendant to garages, such as access by a driveway, were not also required. Otherwise any two-story building could be called a garage. Subsections 199.1 and 2500.5 should be strictly construed in the CBUT District where impervious surfaces are limited in order to preserve and enhance the park-like setting of the Chain Bridge Road/University Terrace District. This interpretation is consistent with the intent of the Zoning Commission in establishing this and other Tree and Slope Overlays. The CBUT Overlay states that among its purposes is to "[p]reserve the natural topography" and "[l]imit permitted ground coverage of new and expanded buildings and other construction, so as to encourage a general compatibility between the siting of new buildings or construction and the existing neighborhood" 11 DCMR § 1565.2 (a) and (c). It would be inconsistent with these purposes to permit an owner to use pervious paving to exceed the 50 percent limitation for impervious surfaces, since the point of the overlay is to retain 50 percent of the lot in a natural state, not encroached upon by pavement, whether impervious or not.

The Board thus concludes that the Zoning Administrator erred in approving the revised permit because the driveway to the accessory garage should have been treated as an "impervious" surface for lot coverage purposes. As a result, DCRA miscalculated the impervious surface coverage Section 1567.2 of the Regulations (within the CBUT Overlay provisions) which provides that the maximum impervious surface coverage on a lot is fifty percent. Because the Board interprets the Regulations to require that a driveway be treated as an impervious surface, the driveway square footage depicted on the plat must be added to the surface coverage calculations. This was not done. According to the Owner's own calculations, the impervious surface coverage was barely within the 50% maximum without including the driveway or drive ramp calculations. Accordingly, when the foot print of the driveway is added to the calculations, the record indicates that the lot coverage for impervious surfaces would exceed the 50% maximum allowed under Section 1567.2 of the Regulations. The Board is required under § 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21, as amended; D.C. Official Code § 1-309.10(d)(3)(A)), to give "great weight" to the issues

and concerns raised in the affected ANC's recommendations. To give great weight, the Board must articulate with particularity and precision why the ANC does or does not offer persuasive advice under the circumstances and make specific findings and conclusions with respect to each of the ANC" issues and concerns. In this appeal, the ANC concurred with the views advanced by the Appellants. For the reasons stated above, the Board finds this advice unpersuasive with respect to the pool permit, but concurs with ANC's views with respect to the revised permit.

Therefore, for the reasons stated above, it is hereby **ORDERED** that:

a. the motion to dismiss the appeal as untimely is **GRANTED** as to the building permit of January 29, 2003 and **DENIED** as to the building permit of May 20, 2003 and June 13, 2003.

Vote taken on November 25, 2003
VOTE: 4-1-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., and David A. Zaidain in favor of the motion, John G. Parsons, opposed)

b. the appeal is **DENIED** with respect to the building permit of May 20, 2003

Vote taken on March 2, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., David A. Zaidain, and John Parsons)

c. the appeal is **GRANTED** with respect to the building permit of June 13, 2003

Vote taken on March 2, 2004
VOTE: 5-0-0 (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., David A. Zaidain, and John G. Parsons)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: AUG 23 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.SG/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17088 of Willie D. Cook, Sr., pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking space requirements under subsection 2101.1, to allow a public hall and summer garden in the C-2-A District at premises 1101 Kenyon Street, N.W. (Square 2844, Lot 819).

HEARING DATE: December 9, 2003
DECISION DATE: January 13, 2004

DECISION AND ORDER

This application was submitted on September 12, 2003 by the owner of the property that is the subject of the application, Willie D. Cook, Sr. ("Applicant"). The Applicant operates a nonconforming bar/restaurant on the subject property. He was informed that because he charges admission, his use is actually a "public hall" and that a public hall has parking requirements under the Zoning Regulations. As there is no room on the subject property to accommodate parking, he applied to the Board for a variance from the parking requirements for a public hall under 11 DCMR § 2101.1.

Following a public hearing on the application on December 9, 2003 and a public decision meeting on January 13, 2004, the Board voted 0-4-1 to deny the application.

PRELIMINARY MATTERS

Notice of Application and Notice of Hearing. By memorandum dated September 17, 2003, the Office of Zoning ("OZ") gave notice of the application to the Office of Planning ("OP"), the District Department of Transportation ("DDOT"), the Councilmember for Ward One, Advisory Neighborhood Commission ("ANC") 1A and Single Member District/ANC 1A06. Pursuant to 11 DCMR § 3113.13, OZ published notice of the hearing on the application in the District of Columbia Register and on September 26, 2003, mailed notices to the Applicant, ANC 1A, and all owners of property within 200 feet of the subject property providing notice of the hearing.

Requests for Party Status. ANC 1A was automatically a party in this proceeding. There were no other requests for party status.

Applicant's Case. The Applicant testified at the hearing that he has been operating his bar/restaurant establishment on the subject property for 13 years and that for 13 years he has been charging admission to defray the cost of entertainment. The Applicant said that he had only recently been informed that his charging of admission turned his use into a "public hall" triggering an off-street parking requirement under the Zoning Regulations.

As the Applicant cannot provide parking for his establishment, he explained that a parking variance is needed.

Government Reports. The Office of Planning submitted a report dated December 2, 2003 recommending denial of the application, although it indicated in the report and again at the hearing that its recommendation was based on the fact that the Applicant had only a tacit, and not an official, agreement with a local elementary school permitting the use of its 26-space parking lot in the evening hours. OP's report discussed the uniqueness of the property, but did not address the question of practical difficulties/undue hardship. OP opined that a reduction of parking spaces to zero would cause adverse impacts to the neighborhood and a substantial impairment of the Zone Plan.

ANC Report. The ANC did not submit a report to the Board or attend the hearing in this case.

FINDINGS OF FACT

1. The subject property is located in Square 2844, lot 819, at address1101 Kenyon Street, N.W. It is at the corner of 11th Street, N.W. and is zoned C-2-A.

2. The property is a triangular-shaped lot that narrows to a point at the 10-foot wide alley abutting it on the north. The property has no, or restricted, access to the alley.

3. The property is improved with a 2-story brick building with basement that was constructed in 1927. The building occupies almost one hundred percent (100%) of the lot.

4. To the north of the property are commercial properties. To the west, south, and southeast are row houses, some of which have been converted to multiple dwellings. Recent and ongoing construction in the area is converting single-family dwellings to multiple dwellings with condominium units, resulting in an increase in density in the area.

5. A bar/restaurant has been operated on the subject property since approximately 1954, though the date of inception was not precisely established. The bar/restaurant use is a non-conforming use and has no parking requirement.

6. The Applicant has operated a bar/restaurant establishment on the subject property since approximately 1990. The establishment has a fenced-in area in the public space adjacent to the building in which the Applicant occasionally holds cookouts as part of his bar/restaurant use.

7. The Applicant's hours of operation are from 8:00 p.m. to 1:00 a.m. on Sunday, Wednesday and Thursday, and from 8:00 p.m. to 2:00 a.m. on Friday and Saturday. The Applicant's establishment is closed on Monday and Tuesday.

8. Ever since 1990, the Applicant has been charging admission to his establishment to defray the cost of providing entertainment, but there is no evidence that an admission charge is necessary to keep the establishment running.

9. In 2001, the Applicant was advised by the Zoning Administrator that the charging of admission makes his establishment a "public hall." *See,* D.C. Official Code § 47-2820 (2001); 19 DCMR § 1699.1. He was also informed that public halls have parking requirements under the Zoning Regulations. *See,* 11 DCMR § 2101.1.

10. A public hall is a matter-of-right use in a C-2-A zone district.

11. The Applicant provides no off-street parking and there is no room on the subject property to accommodate any parking. The Applicant currently uses an area located on the adjacent public space to park his own vehicle.

12. Patrons of the Applicant's establishment have traditionally used on-street parking and a nearby 26-space public school parking lot to park their vehicles. The Applicant, however, does not have oral or written permission to use the lot, nor has he made any attempt to obtain such permission.

13. On September 12, 2003, the Applicant applied to the Board for a variance from the off-street parking requirements for a public hall use.

14. The parking requirement for a public hall is 1 parking space for each 10 seats of occupancy capacity (up to 10,000) and if such seats are not fixed, every 7 square feet usable for seating is considered 1 seat. 11 DCMR § 2101.1.

15. The Applicant's establishment does not have fixed seating, therefore, its parking requirement is based on the amount of square footage "usable for seating."

16. By letter dated January 22, 2001, the Zoning Administrator stated that the Applicant needed to provide 30 off-street parking spaces, but did not provide the amount of square footage "usable for seating" or show, in any other way, how the number 30 was derived.

17. In order to need 30 off-street parking spaces, the Applicant's establishment would have to have 2100 square feet of floor space "usable for seating."

18. OP was uncertain of the amount of square footage usable for seating and therefore of the number of off-street parking spaces required.

19. The Applicant submitted a rough estimate of approximately 1,022 square feet "usable for seating," which, if correct, would result in the need for 15 off-street parking spaces, pursuant to § 2101.1.

20. The Board finds that there is no reliable evidence in the record of the precise amount of floor space "usable for seating" pursuant to § 2101.1 and that it is therefore unclear how many off-street parking spaces are needed. For reasons stated in the conclusions of law, this lack of specificity does not impair the Board's ability to dispose of this application.

21. The Board further finds that the Applicant made no showing that he could not continue to operate his establishment successfully without providing entertainment, simultaneously eliminating the admission charge and the parking requirement.

CONCLUSIONS OF LAW

The Board is authorized to grant a variance from the strict application of the Zoning Regulations where "by reason of exceptional narrowness, shallowness, or shape of a specific piece of property ... or by reason of exceptional topographical conditions or other extraordinary or exceptional situation or condition" of the property, the strict application of any zoning regulation "would result in peculiar and exceptional practical difficulties to or exceptional and undue hardship upon the owner of the property...." D.C. Official Code § 6-641.07(g)(3), 11 DCMR § 3103.2. Relief can only be granted without substantial detriment to the public good and with out substantially impairing the intent, purpose, and integrity of the Zone Plan. *Id.*

An applicant for an area variance must show that the exceptional situation or condition of his property has caused him "practical difficulties," whereas an applicant for a use variance must show "undue hardship." *Palmer v. Board of Zoning Adjustment for the District of Columbia,* 287 A.2d 535 (D.C. 1972). The Applicant herein is requesting a parking variance, which does not fall strictly under the category of area or use variance. *Id.* at 541. Thus, in *Palmer,* the court applied both the practical difficulties and undue hardship tests to a requested variance from the off-street parking requirements for a public hall use. *See also,* Board Order No. 16551.

The subject property is triangular-shaped and narrows to a point. The building on the property, which has been there since 1927, occupies approximately 100% of the lot, leaving no room to provide off-street parking. Further, the property appears to have no, or very restricted, access to the alley to its north. The property has been the site of

continuous commercial operations since approximately 1954. These factors serve to create an extraordinary or exceptional situation or condition of the property for purposes of the first prong of the variance test.

There is, however, no evidence of any practical difficulties or undue hardship to the Applicant arising out of this exceptional situation. The Court in *Palmer* found no practical difficulties or undue hardship under facts strikingly similar to those here. In *Palmer*, the owner of a combination restaurant/record shop wished to expand its business in such a way that it would become a public hall, triggering the off-street parking requirement. The Board denied a special exception for off-street parking on a different lot because the lot was not within 800 feet of the principal use as required. The applicant then applied to the Board for a variance from the 800-foot requirement. The Court held that undue hardship consists of an inability to put the property to any purpose for which it is reasonably adapted. The Court further stated that there is no practical difficulty if a property conforming to the regulations will produce a reasonable income.

Under the standards set forth in *Palmer*, the Applicant has shown neither practical difficulties nor undue hardship. Even if the Applicant cannot expand his use to include a public hall, he is not denied the reasonable use of his property. He can still use it to operate a bar/restaurant establishment or, presumably, other uses permitted in a C-2-A zone. He did not show that he could not operate his bar/restaurant without entertainment, or that the bar/restaurant without entertainment would not produce a reasonable income. There was no evidence that he needed to charge admission in order to keep the establishment running. Admission is charged only to defray the cost of providing entertainment two nights a week. In order to continue to charge admission, he must provide parking. However, the Applicant can continue to operate his bar/restaurant without entertainment, no admission need be charged and no parking need be provided.

Granting the variance to permit the Applicant to run a public hall with no parking will be a substantial detriment to the public good and will impair the intent, purpose, and integrity of the Zone Plan. Patrons of the Applicant's establishment now park in available on-street parking spaces, but with the increasing residential density in the neighborhood, these may soon become unavailable. Patrons also park in the public school parking lot, but the Applicant has made no attempt to obtain permission to use the lot and it may also become unavailable at any time. Moreover, alternative means exist for the Applicant to meet his obligation to provide onsite parking, for example, he may request a special exception in order to provide accessory parking elsewhere. *See,* 11 DMCR § 2116.5.

Because the disposition of this application is not dependent upon ascertaining the precise number of parking spaces required, the Board will not resolve that factual issue.

The Board is required to give "great weight" to the recommendation of Op and to the issues and concerns of the ANC within which the subject property is located. D.C. Official Code §§ 6-623.04 and 1-309.10 (3)(A)(2001). The Board agrees with OP's recommendation of denial of the variance relief requested. The Board is unable to give great weight to the issues and concerns of ANC 1A because it did not participate in this case.

Based on the record before the Board and for the reasons stated above, the Board concludes that the Applicant has failed to satisfy the burden of proof with respect to the application for a variance from off-street parking requirements under subsection 2101.1, to allow a public hall and summer garden in the C-2-A District at premises 1101 Kenyon Street, N.W. Accordingly, the application is hereby **ORDERED DENIED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, David A. Zaidain, Ruthanne G. Miller, and Peter G. May, to deny. The fifth member not present, not voting.)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT.
Each concurring Board member approved the issuance of this order.

FINAL DATE OF ORDER: AUG 25 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."LM/rsn

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17139 of Thomas and Linda Waltz, pursuant to 11 DCMR § 3104.1, for a special exception to allow an addition to an existing single-family dwelling under section 223, not meeting the side yard requirements (section 405) in the WH/R-1-B District at premises 4529 Lowell Street, N.W. (Square 1605, Lot 67).

HEARING DATE: April 6, 2004
DECISION DATE: May 4, 2004

DECISION AND ORDER

Thomas and Linda Waltz, property owners of the subject site, filed an application with the Board of Zoning Adjustment (Board or BZA) on January 30, 2004. The Applicants constructed a second-story addition to their dwelling. The newly constructed addition enlarged an existing bedroom, added a bathroom and closet space. The Applicants indicated that the addition was mistakenly built without the prior approval of the Board because of a series of technical mishaps. The Applicants sought special exception zoning relief under 223, as the addition did not conform to the side yard requirement (§405) of the Zoning Regulations.

The Board heard testimony on the application at its April 6, 2004 public hearing and voted on May 4, 2004 to approve the special exception request.

Preliminary Matters

Self-Certification Philip L. Vandermyde, architect retained by the Applicants, signed a Zoning Self-Certification Form attesting to the relief that was necessary for the project (Exhibit 6).

Notice of Public Hearing Pursuant to 11 DCMR 3113.13, notice was sent 40 days prior to the public hearing to the Applicant, the DC Register, all owners within 200 feet of the subject property, Advisory Neighborhood Commission (ANC) 3D, and the District of Columbia Office of Planning (OP). The Applicant posted the property 15 days prior to the hearing, thereby informing the public of the pending application and the April 6, 2004 hearing date. The Applicant filed a notarized Affidavit of Posting with the Board verifying that the property was posted (Exhibit 24).

Request for Party Status The Board received a request for party status in opposition to the application from Michael J. Sharpston, 4531 Lowell Street, N.W. – owner of the abutting property to the east (Exhibit 20). The Board, by unanimous consensus, granted party status to Mr. Sharpston. In addition to Mr. Sharpston's participation at the public hearing, his counsel Stephen Gell and architect Stephen duPont spoke on his behalf.

Mr. Sharpston stated that the addition would intrude on and diminish the privacy of his second-story open deck, and in his rear yard. He further indicated that the addition would lessen light to his first floor dining and living rooms. He expressed concern that if the Applicants, at a future date, fill in the open space beneath the new addition, light to his downstairs would be drastically affected. Mr. Sharpston was concerned that the Applicants had not consulted with him regarding the addition and the placement of windows in close proximity to his upstairs deck; that they removed a tall Maple tree that provided screening between the two properties; and, that they removed a fence and posts on the west side of the site. Additionally, Stephen duPont indicated that there could be a Building Code requirement regarding the square footage of windows that are allowed within a certain distance of an adjacent property line.

Government Report The Office of Planning (OP), by report dated March 22, 2004, recommended approval of the special exception request to reduce the required side yard setback to 3 feet. OP was of the opinion that the addition would be in harmony with the general purpose and intent of the Zoning Regulations and Map, and that the proposed changes would not tend to affect adversely the use of neighboring properties (Exhibit 23).

ANC Report The ANC voted 5-0-0 at its March 2, 2004 regularly scheduled monthly meeting to recommend that the Board approve the application. The ANC noted that no objections to the application were raised at its public meeting (Exhibit 21).

FINDINGS OF FACT

1. The subject property is located in the Wesley Heights neighborhood of Ward 3 at 4529 Lowell Street, N.W. (Square 1605, Lot 67). The property is occupied with a masonry and wood frame two-story, single-family, detached, dwelling that was constructed in 1927.

2. Two additions were constructed on the dwelling. The first addition consisted of a one-story, 660 square foot room that was built in 1990 on the ground floor on the east side of the building. The second addition, the subject of the application before the Board, entailed the construction in 2003 of an addition to the second floor master bedroom, a new bathroom and closet space on the west side of the property. The 2003 upstairs addition contains approximately 210 square foot and is supported by posts. Open space is located beneath the posts. The gross floor area of the existing building and addition is approximately 3,206 square feet.

3. The Applicants indicated that the addition was mistakenly constructed without prior approval of the Board because of a series of technical difficulties. At the onset, the general contractor inaccurately measured the west side yard, it was shown as 5 feet 2 inches. On that basis, the contractor submitted a plat to the city, which was subsequently approved. A wall check later revealed that the width of the west side yard is 3.1 feet.

4. The property is zoned WH/R-1-B. The R-1-B District permits matter-of-right development of single-family residential uses for detached dwellings with a minimum lot width of 50 feet, a minimum lot area of 5,000 square feet, a maximum lot occupancy of 40 percent for residential uses, a rear yard depth of 25 feet, and a maximum height of three stories/40 feet. In addition to the underlying zoning, the Wesley Heights (WH) Overlay District is mapped at the site.

5. The lot has a width of 50 feet and a depth of 150 feet; it contains a lot area of 7,500 square feet. The site has a 70.6-foot rear depth. The height of the dwelling unit is 26 feet. Two parking spaces are located at the site.

6. At the site, the Zoning Regulations allow a lot occupancy of 40 percent under section 403.2, 50 percent under section 223, and 30 percent under the Wesley Heights Overlay District, section 1543.2. The building has an existing lot occupancy of 1,587 square feet (21 percent). The addition would increase the building's lot occupancy to 24.3 percent.

7. Eight foot side yards are required in the R-1-B District. In the case of a building existing on or before May 12, 1958, with a side yard less than 8 feet, an extension or addition may be made to the building; provided the width of the existing side yard shall not be decreased; and provided that the width of the side yard shall have a minimum of 5 feet. On the east side of the property, the side yard measures 5 feet 7 inches. The measurement of the west side yard is 3 feet 1 inch; the Applicants sought zoning relief for 1 foot 9 inches from the 5 foot requirement for the west side yard.

8. The Applicants filed building plans with the DC Department of Consumer and Regulatory Affairs in December of 2002. Subsequently, in February 2003, Building Permit No. B448996 was issued. The Applicants began construction in May 2003.

9. The Applicants undertook a wall check in July 2003. The wall check revealed that the west side yard was deficient by 1 foot 9 inches; the results were provided to District officials in August 2003. Framing and footings for the building were approved, plumbing and electrical work were completed and inspected by building inspectors. Closing of the interior of the addition was scheduled for December 12, 2003. The closing was disapproved and the Applicants, at that time, voluntarily, stopped working.

10. The Applicants filed a special exception application with the Board requesting relief from the side yard requirement on January 30, 2004.

11. A Maple tree existed between the Applicant's property and the adjacent neighbor's property at 4531 Lowell Street, N.W. The tree was removed prior to construction. The Applicants indicated that the tree had become seriously overgrown and was a potential threat to both properties.

12. Michael J. Sharpston has an open deck on the second story, east side of his property, that is parallel to the Applicants' addition

13. Michael J. Sharpston filed a wall check report dated March 12, 1990, Exhibit 28. Mr. Sharpston indicated that the Applicants were aware of 3.1-foot west side as early as 1990 when the first addition was constructed.

14. Initial building plans filed with the Board by the Applicants showed the windows on the side of the addition in a different location from where they were actually constructed (Exhibit 7).

15. According to records available in the Office of the Surveyor, Mr. Sharpston's property has a 10-feet setback from the shared boundary line. The total distance between the two properties is 13 feet, with the Applicants' 3-foot side yard setback.

16. The Applicants filed petitions from 21 neighborhood residents stating that they did not object to the addition (Exhibit 22).

CONCLUSIONS OF LAW

The Applicants sought a special exception under section 223 pursuant to 11 DCMR § 3104.1 to allow the construction of a second story addition to a single-family, detached, dwelling on the west side of the WH/R-1-B zoned site. The Board is authorized to grant special exceptions where, in the Board's judgment, the special exception would be in harmony with the general purpose and intent of the Zoning Regulations and Zoning Maps and would not tend to affect adversely the use of neighboring. 11 DCMR § 3104. Pursuant to section 223, the Board may permit, by special exception approval, an addition to a one-family dwelling that does not comply with requirements pertaining to minimum lot dimension, lot occupancy, rear and side yards, courts, and nonconforming structures, subject to the conditions enumerated in section 223. The Applicants' property does not comply with requirement pertaining to the side yard requirement.

Side Yards

The site is required to have, at minimum, 5-foot side yards. The east side yard measures 5 feet 7 inches and is in compliance with the Zoning Regulations. The west side yard is not able to meet the requirements of the Regulations; it measures 3 feet 1 inch. The Applicants requested zoning relief for 1 foot 9 inches for the west side yard. With the exception of the side yard, the application met all zoning requirements. The Applicants testified that they were unaware that the west side yard measured 3 feet 1 inch, until the results of the wall check were made available to them. The noncompliant side yard is a condition that exists at site. The building was constructed in 1927, 31 years prior to enactment of the 1958 Zoning Regulations. Therefore, without zoning relief from the

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Board, the Applicants would be restricted from building the addition on the west side of the property. The Board found the requested relief to be minimal, particularly because the dwelling is 77 years old, and the modest addition would be in keeping with current living standards.

The site has a 3.1 foot west side yard, and the adjacent property is 10 feet from the property line. The distance between the two buildings is 13 feet. The Board found that the distance between the two properties is sufficient to ameliorate any potential impacts.

Section 223 Provisions The Board may grant special exception approval in accordance with the provisions enumerated in section 223. The provisions include that the proposed addition must not have a substantially adverse effect on the use or enjoyment of any abutting or adjacent dwelling or property, and in particular (a) the light and air available to neighboring properties must not be unduly affected; (b) the privacy of use and enjoyment of neighboring properties must not be unduly compromised; and (c) the addition, together with the original building, as viewed from the street, alley, and other public way, must not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage, 11 DCMR § 223.2.

a) The light and air available to neighboring properties shall not be unduly affected.

The Board found that the light and air to the neighboring property owner would not be unduly affected. The light and air to the adjacent neighbor to the west would not be significantly compromised because of an additional 1 foot 9 inches. The Board gave credit to the Applicants statement that they attempted to position the windows of the addition so that both properties would have optimal lighting and mutual privacy. Additionally, the Board requested that the Applicants file current plans accurately showing the location of the addition's windows.

The subject lot contains 7,500 square feet. The lot occupancy of the underlying zone and Wesley Heights Overlay District, after the addition, is 24.3 percent, meeting the requirement of the Zoning Regulations. The site has a rear yard depth 70.6 feet. The lot size and rear yard depth, in relationship to the building's lot occupancy, is an indication of the generous amount of light and air available to the abutting property owner.

The Board was persuaded by the Applicants' argument that the Maple tree that provided screening and some privacy between the two properties, had to be felled.

The Board found no reason to condition its Order requiring that the Applicant not enclose the open space below the addition because the adjacent property owner, at some future time, could lose light and air. Prior to any future additions on the west side of the property, the regulatory process would determine that a noncompliant 3.1-foot side yard exists which does not comply with the 5-foot minimum requirement.

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b) The privacy of use and enjoyment of neighboring properties shall not be unduly compromised.

The addition would not unduly compromise the privacy and enjoyment of the adjacent property owner. The record indicates that the Applicants' visibility onto the next-door neighbor's deck and back yard is the same from the second floor bedroom as it would be from the addition, therefore privacy of the neighboring yard would not be compromised. With the introduction of the Applicants' addition, windows provide a view onto the deck, which previously did not exist. However, the Board did not find the neighbor's concerns of privacy compelling, as an open deck does not lend itself to a tremendous amount of privacy.

With reference to Stephen duPont's concern that there could be a Building Code requirement pertaining to the square footage of window space allowed within a certain distance of an adjacent property line, the Board has no jurisdiction over the Building Code, and therefore this concern is not within its purview.

The Board found that although the Applicants did not discuss the addition with the Mr. Sharpston prior to construction, proper and adequate notice of the BZA application and the public hearing were provided as evidenced by (a) the 21 petitions that were filed from persons in support of the application; (b) the mailing from the Board to persons within 200 feet of the site; and (c) the ANC report which indicates that notice was given to the Wesley Heights community.

c) The addition, together with the original building, as viewed from the street, alley, and other public way, shall not substantially visually intrude upon the character, scale and pattern of houses along the subject street frontage.

The finish of the addition complements the existing dwelling, and as such it would not visually intrude on the character, scale and pattern of development on Lowell Street. The addition does not deviate from the pattern of development in the Wesley Heights neighborhood with respect to its design. The front yard setback is equal to the neighboring property owners and does not change in any way with the application. Therefore, the addition causes no visual intrusion as viewed from the street.

The Board is required under Section 13 of the Advisory Neighborhood Commission Act of 1975, effective October 10, 1975 (D.C. Law 1-21), as amended; D.C. Official Code §1-9.10(d)(3)(A)), to give "great weight" to the issues and concerns raised in the affected ANC recommendations. For the reasons stated in this Decision and Order, the Board finds the ANC advice to be persuasive.

In reviewing a special exception application, the Board is also required under D.C. Official Code 6-623.04(2001) to give "great weight" to the recommendation of the Office

of Planning. For the reasons stated in this Decision and Order, the Board finds OP's advice to be persuasive.

For the reasons stated above, the Board concludes that the applicants satisfied the burden of proof with respect to the application for a special exception under § 223 to allow the construction of an addition that does not comply with the side yard requirement in the WH/R-1-B zone.

Accordingly, it is **ORDERED** that the application is **GRANTED**.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann II and John G. Parsons to approve).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member approved the issuance of this Decision and Order.

FINAL DATE OF ORDER: AUG 23 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF

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BAB/8.20.04

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17164 of St. Patrick's Protestant Episcopal Church, pursuant to 11 DCMR § 3104.1 for a special exception under Section 206 to allow the use of a portion of the basement for private school classroom purposes in the R-1-B District at premises 4925 MacArthur Blvd., N.W. (Square 1393, Lot 823).

HEARING DATES: May 18, 2004
DECISION DATE: May 25, 2004

DECISION AND ORDER

The Board of Zoning Adjustment approved Application No. 17164 of St. Patrick's Protestant Episcopal Church to allow classroom use of the cellar in an existing private school in the R-1-B District.

PRELIMINARY MATTERS

Applicant. The application was filed on March 10, 2004 on behalf of St. Patrick's Protestant Episcopal Church (the "Applicant" or "School"), the owner of the property that is the subject of this application.

Application. The application requests a special exception under 11 DCMR § 3104.1, to allow classroom use of a portion of the cellar in an existing private school, under 11 DCMR § 206, in an R-1-B zone district at premises 4925 MacArthur Blvd., N.W. (Square 1393, Lot 823) (the "Property"). The private school use of the Property was originally approved in BZA Order No. 16852 (corrected in Order No. 16852-A). The zoning relief requested in this application is self-certified pursuant to 11 DCMR § 3113.2.

Notice of Application and Notice of Hearing. By memoranda dated March 11, 2004, the Office of Zoning gave notice of the application to the D.C. Office of Planning, the Zoning Administrator, the Councilmember for Ward 3, the D. C. Department of Transportation, and Advisory Neighborhood Commission ("ANC") 3D, the ANC for the area within which the Property is located.

The Board scheduled a public hearing on the application for May 18, 2004. Pursuant to 11 DCMR § 3113.13, the Office of Zoning published notice of the hearing on the application in the District of Columbia Register, and on March 16, 2004, mailed notice of the hearing to the Applicant, the owners of all property within 200 feet of the Property, and ANC 3D.

The Applicant's affidavits of posting and maintenance indicate that two zoning posters were placed at the Property's two street frontages – on MacArthur Blvd, N.W., and Ashby Street, N.W. – beginning on April 30, 2004, in plain view of the public.

Requests for Party Status. The Board received four requests for party status. The Board

granted party status to the Neighbors United Trust ("NUT"), a group of nearby property owners in opposition to the application. Lawrence Skrivseth and Cathy Wright, residents of the property located adjacent to and immediately south of the Property, and Michael Lovendusky, resident of a property located directly across the street from the Property, were denied opposition party status by the Board. The Board determined that those individuals were adequately represented as members of NUT. The Board denied a request for party status in support of the application by Sharon Houy, a resident of the property abutting the School to the east, who did not attend the hearing.

Applicant's Case. The Applicant presented testimony and evidence from David Konapelsky, an architect with GTM Architects recognized by the Board as an expert in architecture, regarding the renovations to the school building and the creation of the cellar space.

Office of Planning ("OP") Report. OP submitted a report and testified that it had reviewed the application with respect to traffic, parking, noise, number of students, and other potentially objectionable conditions. In its report dated May 11, 2004, OP recommended approval of the application on the condition that the exit from the cellar along Ashby Street be used only in emergencies and for emergency drills.

ANC Report. ANC 3D, at its regularly scheduled meeting held on May 5, 2004, voted 3-2 not to oppose the application, stating that it discerned no objectionable effects and no public purpose in preventing the proposed use of the cellar.

Party and Persons in Opposition to the Application. NUT submitted testimony from Nancy Feldman and Katherine Van Sickle Demallie concerning potential objectionable impacts due to the location of the classroom space in the cellar, and particularly concerning the possibility of increased noise from HVAC units.

The Board received two letters in opposition to the application, one from Howard Fenton and Nora Carbine, residents of 4915 Ashby Street, N.W. and one from Lawrence Skrivseth, resident of 4913 MacArthur Boulevard, N.W. Both letters contended that granting the application would increase the usable classroom space available to the Applicant, thus increasing the likelihood that it would request an enrollment increase in the future.

Party and Persons in Support of the Application. The request for party status submitted by Sharon Houy was treated as a letter in support of the application.

Closing of the Record. The record was closed at the end of the hearing, except for specific documents requested by the Board, including a report from NUT on potential noise impacts of the HVAC equipment for the proposed use of the cellar. NUT filed a report prepared by R. Petrossian & Associates, but the evaluators did not personally visit or observe the operation of the HVAC equipment and the report does not address the level of sound emanating from the equipment.

Decision Meeting. At its public decision meeting on May 25, 2004, the Board approved the application by a vote of 5-0-0.

FINDINGS OF FACT

The Property and the Surrounding Area

1. The Property consists of approximately 21,000 square feet of land area located in an R-1-B zone district at 4925 MacArthur Boulevard, N.W. (Square 1393, Lot 823). The Property has approximately 150 feet of street frontage on MacArthur Boulevard as well as frontage on Ashby Street, N.W.

2. The Property is located in the Palisades neighborhood of Ward 3, at the corner of MacArthur Blvd. and Ashby Street. Ashby Street is a narrow residential street improved with single-family houses.

3. The Property contains a 2-1/2 story building, built in 1905, in its northwest corner. The remainder of the Property is occupied by a parking lot and a large lawn. The building consists of approximately 4,325 square feet of usable space suited to the seminar-style classroom format used by the Applicant.

The Proposed Private School Use

4. In BZA Application No. 16852, the BZA approved the School's special exception request to operate a private middle school, grades seven through nine, for 40 students, and not more than eight full-time and four part-time faculty and staff. Order No. 16852, dated March 25, 2003, (the "Order") contains 20 conditions intended to minimize any adverse impact on neighboring properties.[1]

5. The Order approved the Applicant's plans for a complete rehabilitation and upgrading of the existing building. The Applicant removed fire escapes on the eastern and southern sides of the building, and fully renovated the interior of the building and converted it to seminar-style classrooms. The Order approved changes to the footprint of the building to allow the Applicant to make life safety and handicapped accessibility upgrades, including the provision of code-compliant handicapped restrooms. All of the life-safety and handicapped accessibility upgrades were required by the D.C. Construction codes or the Americans with Disabilities Act, and have been completed as approved in the Order.

6. At the time the original special exception application was filed, the Applicant did not intend to install a sprinkler system and so proposed to use the cellar only for utility and storage space. The Applicant's architect had prepared only conceptual drawings, which did not address all code-related issues.

7. After approval of the original application, the Applicant decided to install a sprinkler

[1]The Order was corrected by Order No. 16852-A, also dated March 25, 2003. The correction was minor and did not change the substance of Order No. 16852.

system. The Applicant's architect continued with the permit review process and the preparation of working drawings. As a result of the permit review process and the completion of the working drawings, certain changes were made to the design of the building, particularly to the cellar, in order to comply with all building codes and applicable statutes.

8. One of these design changes was the inclusion of a second means of egress from the cellar. A portion of the terrace was enclosed to provide an enclosure for the egress stairway. The enclosure comprises 50 square feet of a 764-square-foot terrace and does not add significant density to the building. The Board credits the testimony of the Applicant's architect that the additional egress stair was required by the building code.

9. A second design change was the lowering of the floor slab in the cellar to accommodate equipment specifications, site conditions, the ceiling height required by the building code, and the addition of new underpinning, floor framing, steel beams, interior steel columns and footings. The Board credits the architect's testimony that the floor slab was lowered as a result of all the above-mentioned factors, the significance of which arose during the preparation of the working drawings and therefore after the original special exception application was filed.

10. The design changes resulted in approximately 320 square feet of cellar space usable for a classroom. The remainder of the cellar will be used as three utility rooms, two stairs, a storage area, an elevator, an elevator machine room, a mechanical room, and a corridor.

11. The School proposes to use the 320 square feet of usable cellar space as a music room. The room would be used only during school hours (*i.e.*, from 7:30 a.m. until 4:00 p.m.). The instruments to be used in the room will not be amplified, as set forth in the conditions in BZA Order No. 16852 (corrected in Order No. 16852-A).

12. The cellar music room, which has one small window, will replace the current music room, which is located on the second floor and has two large windows spanning almost the entire height of the room. The existing stone cellar foundation walls are a minimum of 18 inches thick and the interior walls include steel studs, acoustical batt insulation, and gypsum wallboard. The cellar ceiling also has additional acoustical batt insulation and layers of gypsum board as compared to typical ceiling construction.

13. The Board credits the report of Polysonics Corp. that the HVAC equipment serving the building, including the cellar, operates within the parameters of District of Columbia regulations governing acceptable noise limits.

14. Relocation of the music room from the second floor to the cellar will not alter the HVAC equipment otherwise in use at the Property and therefore will not cause a change in the amount of noise produced by such equipment.

15. The School building is located on a large lot and is set back 37 feet from the property line, along which is a board-on-board fence six feet high. The fence continues along the southern property line, from which the building is set back 95.5 feet.

16. The Board credits the Applicant's testimony that use of the cellar as a music room will have no effect on traffic, parking, number of students, or number of faculty and staff.

17. The Office of Planning recommended approval of the Application, and ANC 3D stated that it had no objection to the proposed use.

18. The proposed use of a portion of the cellar as a classroom is a result of enhancements to the building that make the School safer for the students. It will have no effect on the height, lot occupancy, or other area requirements of the R-1-B district. Use of the planned music room in the cellar will have little effect on the School's operations or its impact on neighboring properties.

CONCLUSIONS OF LAW AND OPINION

The Board of Zoning Adjustment is authorized under the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D.C. Official Code § 6-641.07(g)(2) (2001)), to grant special exceptions as provided in the Zoning Regulations. The Applicant applied under 11 DCMR § 3104.1 for a special exception pursuant to 11 DCMR § 206 to allow the use of a cellar room located in the existing private school building located on the Property for classroom purposes. The notice requirements of 11 DCMR § 3113 for a public hearing on the application have been met.

The Applicant is a private school as that term is used in the Zoning Regulations. To meet its burden of proof under Subsection 3104.1, the Applicant must demonstrate that the proposed private school use of the cellar would meet the special conditions listed in Section 206; that it would be in harmony with the general purpose and intent of the Zoning Regulations and Map; and that it would not be likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or other objectionable conditions. Under Subsection 206.3, ample parking space, but not less than that required in Chapter 21 of this title, must be provided to accommodate the students, teachers, and visitors likely to come to the site by automobile.

The Board previously approved private school use of the Property in its Order No. 16852 (corrected in Order No. 16852-A), in which it determined the School had met its burden under § 206 for use of the building as a private school. The use of a small portion of the cellar as a classroom will have little effect on the neighboring properties. In fact, relocating the music room from a second-story windowed space to the stone-lined cellar will help mitigate potential adverse impacts of the private school use by muffling sounds emanating from the music room.

Opposition party NUT was particularly concerned with the noise produced by the HVAC equipment, but failed to show an objectionable impact on nearby property. In contrast, the

Applicant submitted an analysis of the noise from the HVAC equipment in use at the property, which shows it to be well within District of Columbia standards for permitted decibel levels. Exhibit No. 30. The relocation of the music room will not change the equipment in use and therefore will not cause any increase in noise. Further, the property is large and the building well set back from the property lines, thereby reducing any noise that might be heard off the property.

The Board notes that the relocation of the music room to the cellar does not represent an "expansion" of the school use. The School, as originally planned, and as originally considered by this Board, was to have a music room. The only question is where, within the building, it will be located. The Board also notes that no increase in enrollment will be caused by, or has been requested because of, the relocation of the music room. Whether the music room is on the second floor or in the cellar, the Applicant is still subject to the conditions in Order No. 16852 (corrected in Order No. 16852-A) concerning number of faculty and student enrollment. Therefore, permitting the music room to be relocated to the cellar will have no impact on the overall operation of the School, the number of faculty or students, or the amount of parking or traffic attributable to them.

The Board is required, under D.C. Official Code § 1-309.10(3)(A) (2001), to give "great weight" to the issues and concerns of the ANC for the area within which the Property is located. The Board is also required, under D.C. Official Code § 6-623.04 (2001), to give "great weight" to OP's recommendations. The Board has carefully considered the ANC's report and agrees with the ANC that the proposed use will present no objectionable effects. The Board also agrees with OP that the proposed use of a portion of the cellar as a classroom will not alter the compatibility of the School with the neighborhood and that it will not cause objectionable impacts on nearby properties. The Board notes OP's recommendation that the exit from the cellar along Ashby Street be used only in emergencies and for emergency drills.

The private school use is compatible with the neighborhood wherein it is located. The proposed use of a portion of the cellar as a music room will not alter this use in any significant way. Therefore, granting special exception relief to permit relocation of the music room is in harmony with the general purpose and intent of the Zoning Regulations and Map. Further, because the proposed relocation of the music room will have a limited, and potentially beneficial, impact on noise, and no impact on traffic, parking, number of students, or number of faculty, it will have no objectionable impacts on neighboring properties.

For the reasons stated above, the Board concludes that the Applicant has met the burden of proof for a special exception under §§ 3104.1 and 206, and it is hereby **ORDERED** that the application be **GRANTED**, **SUBJECT** to the **CONDITIONS** set forth in Board of Zoning Adjustment Order No. 16852, as corrected by Board of Zoning Adjustment Order No. 16852-A, both dated March 25, 2003, which conditionally approved the private school use of the Property.

VOTE: **5-0-0** (Geoffrey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr., John A. Mann, II, and Anthony J. Hood (by absentee vote) to approve)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT

EACH CONCURRING MEMBER HAS APPROVED THE ISSUANCE OF THIS DECISION AND ORDER AND AUTHORIZED THE UNDERSIGNED TO EXECUTE THE DECISION AND ORDER ON HIS OR HER BEHALF.

FINAL DATE OF ORDER: AUGUST 25, 2004

PURSUANT TO 11 DCMR 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN SIX MONTHS AFTER IT BECOMES EFFECTIVE UNLESS THE USE APPROVED IN THIS ORDER IS ESTABLISHED WITHIN SUCH SIX-MONTH PERIOD.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. LM/RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17165-A of Public Storage, Inc., pursuant to 11 DCMR § 3103.2, for a variance from the off-street parking requirements under subsection 2101.1, and a variance from the loading requirements under subsection 2201.1, to permit the development of a three story self-storage facility in the C-M-1 District at premises 1600-18 Bladensburg Road, N.E. (Square 4273, Lots 3 and 4).

Note: On August 3, 2004, the Board, at a regularly scheduled public meeting, voted to approve Applicant's timely filed motion for reconsideration of the condition imposed in Order No. 17165, dated June 23, 2004. The Board's vote included the re-issuance of the order without any conditions. In brief, the Board found that it erred by imposing the signage condition as no nexus existed between the variance relief being sought in the application and the condition imposed.

HEARING DATE: June 8, 2004
DECISION DATE(S): June 22, 2004, August 3, 2004

SUMMARY RECONSIDERATION ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 5B, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 5B. The ANC 5B single member district representative submitted a letter in support of the application. The OP submitted a report recommending approval of the application.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 2101.1 and 2201.1, that there exists an

exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that the **Motion for Reconsideration of the Condition in BZA Order No. 17165, dated June 23, 2004, be GRANTED, and said Order be reissued GRANTING the application without Condition.**

VOTE (August 3, 2004): **3-1-1** (Ruthanne G. Miller, Curtis L. Etherly, Jr., and John Mann II to approve, John G. Parsons opposed to the motion, and Geoffrey H. Griffis not voting, not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

FINAL DATE OF ORDER: AUG 04 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY

OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17170 of Georgetown Day School, pursuant to 11 DCMR § 3104.1, for a special exception to allow the renovation and construction of an addition to an existing private school under section 206 (this application does not include a request to increase the student enrollment or number of permitted faculty and staff) in the R-2 District at premises 4200 Davenport Street, N.W. (Square 1672, Lot 821).

HEARING DATE: June 22, 2004
DECISION DATE: August 3, 2004

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 3E and the owners of property within 200 feet of the site. The application was referred to the Office of Planning and the Department of Transportation ("DDOT") for review and report.

The site of this application is located within the jurisdiction of ANC 3E. ANC 3E, which is automatically a party to this case, filed a Resolution in support of this application. ANC 3E has informed the Board that the ANC and the applicant have entered into a voluntary agreement regarding certain aspects of the operation of Georgetown Day School High School and the School's relationship with the surrounding neighborhood. The Office of Planning submitted a report recommending approval of the application. DDOT submitted a report supporting the application.

As directed by 11 DCMR §§ 3104.1 and 206, the Board has required that the applicant satisfy the burden of proving the elements necessary to establish a case for a special exception. No person or entity appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

To be entitled to a special exception for a private high school under 11 DCMR §§ 3104.1 and 206, the applicant must demonstrate: (i) it is located so that it is not likely to become objectionable to adjoining and nearby property because of noise, traffic, number of students, or otherwise objectionable conditions; (ii) the site provides ample parking space to accommodate the students, teachers, and visitors likely to come to the site by

automobile; and (iii) the approval does not tend to affect adversely the use of neighboring properties and such approval is in general harmony with the purpose and intent of the Zoning Regulations and Map. Based on the record before the Board, the Board concludes that the applicant has met the burden of proof for a special exception under 11 DCMR §§ 3104.1 and 206. The School and ANC 3E proffered identical conditions upon which they reached agreement. This application is subject to those conditions as modified and adopted by the Board as follows:

It is therefore **ORDERED** that this application be **GRANTED** subject to the following **CONDITIONS**:

1. Approval shall be limited to the High School, grades 9-12.

2. The number of enrolled students at the High School shall not exceed 465 .

3. The High School shall have a maximum of 95 full-time equivalent faculty and staff members.

4. The southeast portion of the site located at the northwest corner of the intersection of 42nd and Chesapeake Streets shall be landscaped and maintained as open space. No parking shall be permitted on this portion of the site.

5. At the beginning of each school year, but in no event later than October 15th, the School shall provide to the Board and the Zoning Administrator documentary evidence to demonstrate its enrollment figures and compliance with the terms and conditions of this Order, including the Transportation Management Program referenced in Condition Number 10 of this Order. This information must be served on the ANC, which will have an opportunity to respond to the School's submission.

6. The School shall be available, at the request of Advisory Neighborhood Commission 3E, during the fall and spring of each year to discuss any issues of concern to the community. The School shall attend any additional meetings deemed necessary by the School and/or the ANC to address issues and concerns raised by the community.

7. All vehicular traffic to and from the site shall use the Davenport Street entrance. Pedestrian access only will be permitted at the 42nd Street entrance, which shall be monitored from 7:45 to 8:15 a.m.

8. All pick-up or drop-off of students shall occur on the School grounds.

9. The site shall continue to provide one emergency access point on 43rd Street, which shall be secured by a 6.5-foot gate. The gate shall be locked at all times except for access by emergency vehicles.

10. A Transportation Management Program shall be established, instituted and monitored by the School. The Transportation Management Program shall include the following elements:

(a) The School shall encourage the use of public transportation as the primary means of accessing the school by the faculty, staff, and students.

(b) The School shall make available to all students reduced fare Metro rail passes to encourage use of public transportation.

(c) No student shall drive a vehicle to School unless there is an on-site parking space for that vehicle.

(d) At the beginning of each school year, all students must register their vehicles with the school.

(e) The School shall strictly prohibit students from parking on residential streets surrounding the campus during all hours that the school's on-site parking is available for use.

(f) School employees will be trained at the beginning of each year to implement and enforce the Transportation Management Program.

(g) School employees shall monitor the streets surrounding the campus for one semester after the opening of the garage to enforce the Transportation Management Program.

(h) The Transportation Management Program shall become a part of the enrollment contract between the School and parent, by which the parents shall agree to be bound by its rules, fines and punishments.

11. The surface parking area shall be secured by a chain gate, cable, or similar device during all hours that the lot is not in use. When the parking area is open during non-school hours, the School shall provide security to prevent unauthorized parking.

12. The parking garage shall be available for use at all times that the school is open. The School shall have security personnel on duty at the School and monitoring the garage at all hours that the garage is open. The garage shall be secured during all hours that it is not in use.

13. During special events, which increase the demand for parking beyond the number of spaces available on site, the School shall provide shuttle bus service to minimize potential overflow parking on neighborhood streets by visitors to the School. Adequate notice of such service shall be provided by the School to all invited participants in the special event.

14. All extracurricular or inter-scholastic activities held on site shall be concluded by 11:30 p.m.

15. All interscholastic athletic events utilizing the athletic field shall be scheduled to conclude no later than 7:30 p.m. In situations where an event goes into overtime, is subject to weather delays, or is subject to other conditions that force the event past 7:30 p.m., the event must be concluded no later than 8:00 p.m.

16. There shall be no artificial lighting of the athletic field.

17. The bell system within the School shall not be audible in the neighborhood except for standard emergency alarm systems.

18. Students parking cars on either the surface lot or in the garage are to stay on campus during the hours that classes are in session except for trips off-campus for the following purposes:

    (a) work or internship related activities;

    (b) community service events;

    (c) school or extracurricular-related activities; or

    (d) approved leave.

19. All existing and new mechanical units, including air conditioning, heating, ventilation, and emergency generators shall be oriented towards the northern side of the mechanical penthouse, away from the adjacent residential neighbors on the southern side of the Georgetown Day School property, as shown in the Plans marked as Exhibit 29 of the record.

20. The School may make its High School facilities and grounds available to organized community groups.

21. During any period of time when the existing campus parking spaces are reduced, the School shall provide the same number of parking spaces elsewhere and shall fully enforce the School's existing parking restrictions.

Pursuant to 11 DCMR §3100.6, the Board has determined to waive the requirement of 11 DCMR §3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 5-0-0 (Geoffey H. Griffis, Ruthanne G. Miller, Curtis L. Etherly, Jr. and John A. Mann II to approve, Anthony J. Hood to approve by proxy)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this summary order.

FINAL DATE OF ORDER: AUG 06 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3205, FAILURE TO ABIDE BY THE CONDITIONS IN THIS ORDER, IN WHOLE OR IN PART, SHALL BE GROUNDS FOR THE REVOCATION OF ANY BUILDING PERMIT OR CERTIFICATE OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE

PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17175 of Douglas Development Corp./Jemal's Wheel LLC, pursuant to 11 DCMR § 3104.1, for a special exception from the roof structure requirements under section 411, and a special exception to increase the building height to 50 feet pursuant to section 1402, and pursuant to 11 DCMR § 3103.2, variances from the lot occupancy requirements under section 772, the residential recreation space requirements under subsection 773.3, the side yard requirements under subsections 775.5 and 2001.3, and the parking aisle width requirements under subsection 2117.5, to permit the development of a 4 story apartment house in the RC/C-2-B District at premises 1701 Kalorama Road, N.W. (Square 2655, Lot 90).

HEARING DATE: June 29, 2004
DECISION DATE(S): July 6, 2004, July 13, 2004, August 3, 2004

Note: The application as filed requested a variance from Section 773.7, the dimensional requirements for residential recreation space on a roof. Due to refinements in the plans and the Board's decision to require residential recreation space on the roof as set forth in the condition to this Order, the Board granted a variance from Section 773.3, the amount of residential recreation space provided, but not a variance from the dimensional requirements of Section 773.7. This further resulted in the Board granting roof structure relief to allow multiple roof structures, roof structures having walls of unequal height and one roof structure not meeting the setback requirement from a side wall of the building.

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application by publication in the D.C. Register and by mail to the Applicant, Advisory Neighborhood Commission (ANC) 1C, and to owners of all property within 200 feet of the property that is the subject of this application. The application was also referred to the Office of Planning (OP). The OP submitted a report in support of the application. The subject property is located within the jurisdiction of ANC 1C. ANC 1C submitted a letter in support of the application.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a special exception pursuant to 11 DCMR §§ 3104.1, 411and 1402, and variances under 11 DCMR § 3103.2 from the strict application of the requirements of §§ 772, 773, 775, 2001.3, and 2117.5.

No party appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

The Board closed the record at the conclusion of the hearing. Based upon the record before the Board, and having given great weight to the Office of Planning and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proof pursuant to 11 DCMR § 3104.1, for a special exception under section 411 and 1402, that the requested relief can be granted as in harmony with the general purpose and intent of the Zoning Regulations and Map and will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

The Board also concludes that the applicant has met its burden of proof under 11 DCMR §§ 3103.2, 772, 773, 775, 2001.3 and 2117.5, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the requested relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map. The Board further concludes that the practical difficulty associated with providing residential recreation space on the roof of the building comes from the difference between the Building Code requirements for the width of the stairs required to serve the number of units in the building and the width required to provide egress from the roof for the number of people who could be accommodated in the amount of space required by Section 773.3. It is therefore **ORDERED** that the application is **GRANTED, SUBJECT** to the **CONDITION** that the roof deck shall contain residential recreation space on the maximum square footage permitted under the Building Code within the limit of the minimum width of the stairs meeting the occupancy load for the 48 unit residential use of the building.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is appropriate in this case.

VOTE: 3-0-2 (Geoffrey H. Griffis, John A. Mann II and Ruthanne G. Miller to approve, Curtis L. Etherly, Jr., and the Zoning Commission member not voting not having heard the case).

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member has approved the issuance of this Order.

FINAL DATE OF ORDER: AUG 04 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN

ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17176-A of International Real Estate and High Tech Investment Group, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 772, a variance from the rear yard requirements under section 774, a variance from the court requirements under section 776, and a variance from the nonconforming structure provisions under subsection 2001.3, to construct an addition to an existing apartment building in the C-2-A District at premises 1320 9th Street, N.W. (Square 367, Lot 823).

HEARING DATE: July 27, 2004
DECISION DATE: July 27, 2004 (Bench Decision)

CORRECTED SUMMARY ORDER

* This order corrects BZA Order No. 17176, by adding section 776 (Court Requirements) to the variance relief approved by the Board at the July 27, 2004, public hearing.

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 2F, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 2F. ANC 2F submitted a letter in support of the application. The OP submitted a report recommending approval of the application.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP and ANC reports filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 772, 774, 776 and 2001.3, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the

Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: **5-0-0** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller, John A. Mann, II and John G. Parsons to approve)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

FINAL DATE OF ORDER: August 2, 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS

AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17177 of Debra Moss and Jerry Crute, pursuant to 11 DCMR § 3103.2, for a variance from the lot occupancy requirements under section 403, a variance from the rear yard requirements under section 404, and a variance from the nonconforming structure requirements under subsection 2001.3, to construct a three story rear addition to an existing single-family row dwelling in the CAP/R-5-B District at premises 304 Maryland Avenue, N.E. (Square 783, Lot 37).

HEARING DATE: July 6, 2004
DECISION DATE: August 3, 2004

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of public hearing on this application, by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6C, the Office of Planning (OP) and to owners of property within 200 feet of the site. The site of the application is located within the jurisdiction of ANC 6C. ANC 6C submitted a letter in support of the application. The OP submitted a report recommending approval of the application.

As directed by 11 DCMR § 3119.2, the Board required the applicant to satisfy the burden of proving the elements that are necessary to establish the case for a variance pursuant to 11 DCMR §§ 3103.2. No parties appeared at the public hearing in opposition to the application. Accordingly, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the OP report filed in this case, the Board concludes that the applicant has met the burden of proving under 11 DCMR §§ 3103.2, 403, 404 and 2001.3, that there exists an exceptional or extraordinary situation or condition related to the property that creates a practical difficulty for the owner in complying with the Zoning Regulations, and that the relief can be granted without substantial detriment to the public good and without substantially impairing the intent, purpose, and integrity of the zone plan as embodied in the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. The waiver will not prejudice the rights of any party, and is not prohibited by law. It is therefore **ORDERED** that this application be **GRANTED.**

VOTE: **4-0-1** (Geoffrey H. Griffis, Curtis L. Etherly, Jr., Ruthanne G. Miller to approve, Carol J. Mitten to approve by proxy and John A. Mann, II not voting, not having heard the case)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring Board member has approved the issuance of this order.

FINAL DATE OF ORDER: AUG 04 2004

PURSUANT TO 11 DCMR § 3125.6, THIS ORDER WILL BECOME FINAL UPON ITS FILING IN THE RECORD AND SERVICE UPON THE PARTIES. UNDER 11 DCMR § 3125.9, THIS ORDER WILL BECOME EFFECTIVE TEN DAYS AFTER IT BECOMES FINAL.

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

THE APPLICANT IS REQUIRED TO COMPLY FULLY WITH THE PROVISIONS OF THE HUMAN RIGHTS ACT OF 1977, D.C. LAW 2-38, AS AMENDED, AND THIS ORDER IS CONDITIONED UPON FULL COMPLIANCE WITH THOSE PROVISIONS. IN ACCORDANCE WITH THE D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT

DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS, PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ZONING ADJUSTMENT

Application No. 17196 of Sam Daley-Harris, pursuant to 11 DCMR § 3104.2, for a special exception to allow a two-story rear addition and porch to an existing flat (two-family row dwelling) under section 223, not meeting the lot occupancy requirements (section 403), side yard requirements (section 405), court requirements (section 406), and nonconforming structure provisions (subsection 2001.3), in the R-4 District at premises 707 East Capitol Street, S.E. (Square 898, Lot 27).

HEARING DATE: July 20, 2004
DECISION DATE: August 3, 2004

SUMMARY ORDER

SELF-CERTIFIED

The zoning relief requested in this case was self-certified, pursuant to 11 DCMR § 3113.2.

The Board provided proper and timely notice of the public hearing on this application by publication in the D.C. Register, and by mail to Advisory Neighborhood Commission (ANC) 6B and to owners of property within 200 feet of the site. The site of this application is located within the jurisdiction of ANC 6B, which is automatically a party to this application. ANC 6B submitted a letter in support of the application. The Office of Planning (OP) submitted a report in support of the application.

As directed by 11 DCMR § 3119.2, the Board has required the Applicant to satisfy the burden of proving the elements that are necessary to establish the case pursuant to § 3104.1, for special exception under § 223. No parties appeared at the public hearing in opposition to this application or otherwise requested to participate as a party in this proceeding. Accordingly, as set forth in the provisions and conditions below, a decision by the Board to grant this application would not be adverse to any party.

Based upon the record before the Board and having given great weight to the ANC and OP reports the Board concludes that the Applicant has met the burden of proof, pursuant to 11 DCMR §§ 3104.1 and 223, that the requested relief can be granted, subject to the conditions set forth below, as being in harmony with the general purpose and intent of the Zoning Regulations and Map. The Board further

concludes that granting the requested relief will not tend to affect adversely the use of neighboring property in accordance with the Zoning Regulations and Map.

Pursuant to 11 DCMR § 3101.6, the Board has determined to waive the requirement of 11 DCMR § 3125.3, that the order of the Board be accompanied by findings of fact and conclusions of law. It is therefore **ORDERED** that this application be **GRANTED**.

VOTE: **4-0-1** (Geoffrey H. Griffis, Ruthanne G. Miller, John A. Mann II to approve, Anthony J. Hood to approve by proxy, and Curtis L. Etherly, Jr. not voting, not having heard the case)

BY ORDER OF THE D.C. BOARD OF ZONING ADJUSTMENT
Each concurring member approved the issuance of this order.

FINAL DATE OF ORDER: July 4, 2004

UNDER 11 DCMR 3125.9, "NO DECISION OR ORDER OF THE BOARD SHALL TAKE EFFECT UNTIL TEN DAYS AFTER HAVING BECOME FINAL PURSUANT TO THE SUPPLEMENTAL RULES OF PRACTICE AND PROCEDURE FOR THE BOARD OF ZONING ADJUSTMENT."

PURSUANT TO 11 DCMR § 3130, THIS ORDER SHALL NOT BE VALID FOR MORE THAN TWO YEARS AFTER IT BECOMES EFFECTIVE UNLESS, WITHIN SUCH TWO-YEAR PERIOD, THE APPLICANT FILES PLANS FOR THE PROPOSED STRUCTURE WITH THE DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS FOR THE PURPOSES OF SECURING A BUILDING PERMIT.

PURSUANT TO 11 DCMR § 3125 APPROVAL OF AN APPLICATION SHALL INCLUDE APPROVAL OF THE PLANS SUBMITTED WITH THE APPLICATION FOR THE CONSTRUCTION OF A BUILDING OR STRUCTURE (OR ADDITION THERETO) OR THE RENOVATION OR ALTERATION OF AN EXISTING BUILDING OR STRUCTURE, UNLESS THE BOARD ORDERS OTHERWISE. AN APPLICANT SHALL CARRY OUT THE CONSTRUCTION, RENOVATION, OR ALTERATION ONLY IN ACCORDANCE WITH THE PLANS APPROVED BY THE BOARD.

D.C. HUMAN RIGHTS ACT OF 1977, AS AMENDED, D.C. OFFICIAL CODE § 2-1401.01 ET SEQ., (ACT) THE DISTRICT OF COLUMBIA DOES NOT DISCRIMINATE ON THE BASIS OF ACTUAL OR PERCEIVED: RACE, COLOR, RELIGION, NATIONAL ORIGIN, SEX, AGE, MARITAL STATUS,

PERSONAL APPEARANCE, SEXUAL ORIENTATION, FAMILIAL STATUS, FAMILY RESPONSIBILITIES, MATRICULATION, POLITICAL AFFILIATION, DISABILITY, SOURCE OF INCOME, OR PLACE OF RESIDENCE OR BUSINESS. SEXUAL HARASSMENT IS A FORM OF SEX DISCRIMINATION WHICH IS ALSO PROHIBITED BY THE ACT. IN ADDITION, HARASSMENT BASED ON ANY OF THE ABOVE PROTECTED CATEGORIES IS ALSO PROHIBITED BY THE ACT. DISCRIMINATION IN VIOLATION OF THE ACT WILL NOT BE TOLERATED. VIOLATORS WILL BE SUBJECT TO DISCIPLINARY ACTION. THE FAILURE OR REFUSAL OF THE APPLICANT TO COMPLY SHALL FURNISH GROUNDS FOR THE DENIAL OR, IF ISSUED, REVOCATION OF ANY BUILDING PERMITS OR CERTIFICATES OF OCCUPANCY ISSUED PURSUANT TO THIS ORDER. RSN

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